The Law Commission

Working Paper No. 88

and

The Scottish Law Commission

Consultative Memorandum No. 63

Private International Law
The Law of Domicile

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It does not represent the final views of the two Law Commissions.

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THE LAW COMMISSION
WORKING PAPER NO. 88

AND

THE SCOTTISH LAW COMMISSION
CONSULTATIVE MEMORANDUM NO. 63

PRIVATE INTERNATIONAL LAW

THE LAW OF DOMICILE

PART I

INTRODUCTION

GENERAL STATEMENT

1.1 Under United Kingdom law, many aspects of a person's private life, such as the essential validity of marriage; the effect of marriage on property rights; legitimacy, legitimation and adoption; wills of moveable property and intestate succession are governed by the law of his country of domicile. In general, a person is domiciled in the country where he has his permanent home or in which he is living indefinitely. Domicile is therefore a connecting factor because it connects a person for certain purposes with a particular legal system. This consultation paper examines and makes provisional recommendations in respect of:

(a) the desirability of substituting a different connecting factor for domicile, and

(b) the rules for determining the domicile of natural persons

and invites comments on these recommendations.

BACKGROUND TO THE PAPER

1.2 The Law Commission and the Scottish Law Commission have undertaken this examination of the law of domicile as part of a systematic reform of the rules of private international law.[1] Over the years the Commissions have become increasingly aware of the need to review the law of domicile[2] and, rather than examine parts of that area of the law as they have arisen in connection with other projects, have preferred "a more general consideration of the whole question of the law of domicile in a United Kingdom context"[3]. Thus in January 1984 we set up a Joint Working Party, which included representatives of interested Government Departments, and Professors Anton[4] and McClean,[5] to advise on problems in the existing law and proposals for reform. The Working Party met twice and completed their task in May 1984. The members of the Working Party are named in Appendix A and we are very grateful to them for the help which they have given us. We should, however, emphasise that the views expressed in this paper are not, as such, those of the Working Party. The general policy of the paper was agreed at a joint meeting of the two Law Commissions and responsibility for the actual preparation of this paper was delegated to three Commissioners from each.[6]

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1 Third Programme of Law Reform (1973) Law Com. No. 54, Item No. XXI; Scot. Law Com. No. 29, Item No. 15.

2 Working Paper No. 83 and Consultative Memorandum No. 56 on Polygamous Marriages (1982) para. 5.35 and Working Paper No. 74 (1979) and Consultative Memorandum No. 53 (1982) on Illegitimacy, Part VIII and paras. 10.6-10.8 respectively.

3 Reports on Illegitimacy (1982) Law Com. No. 118, para. 13.3 and (1984) Scot. Law Com. No. 82, para. 8.8.

4 Consultant to the Scottish Law Commission.

5 At the University of Sheffield.

6 Sir Ralph Gibson, Dr. P.M. North and Mrs. B. Hoggett of the Law Commission and Dr. E.M. Clive, Mr. J. Murray Q.C. and Sheriff C.G.B. Nicholson Q.C. of the Scottish Law Commission. (Although Dr. North left the Law Commission in September 1984 he has continued his involvement with the preparation of this paper.)

SCOPE OF THE PAPER

1.3 This review of the law has been conducted on the basis that any changes in the law will be implemented not only in England and Wales and in Scotland, but also in Northern Ireland,[7] so that the same rules will apply throughout the United Kingdom. Accordingly, although Northern Ireland was not represented on the Working Party, the Office of Law Reform in Belfast was kept in touch with the matters considered and the conclusions reached by the Working Party, as work progressed.

1.4 The scope of this paper is confined to the domicile of natural persons. It does not examine the law of domicile as it applies to corporations, which, so far as we are aware, causes no serious problem. In addition, we do not think it would be appropriate at this stage to reconsider the concept of domicile as it has been specially defined for the purposes of the Civil Jurisdiction and Judgments Act 1982. We may add that tax legislation uses domicile along with residence and nationality and other concepts of the general law such as family relationships. Although we are not aware of any particular tax problems to which our proposals might give rise, we would welcome comment on that matter. However, even if it were felt that the amendments which we propose to the law of domicile might adversely affect the tax position of certain classes of person the appropriate action, in our view, would be to seek to amend the tax legislation, rather than resist otherwise desirable changes in the law of domicile.[8]

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7 Section 1(5) of the Law Commissions Act 1965 precludes the Law Commission from considering "any law of Northern Ireland which the Parliament of Northern Ireland has power to amend." Read with section 40(2) of the Northern Ireland Constitution Act 1973, the Law Commission's remit is limited (in so far as Northern Ireland is concerned) to matters over which the Northern Ireland Parliament did not have legislative competence under the Government of Ireland Act 1920: that is, "excepted" and "reserved" matters. Domicile is a reserved matter and is, therefore, within the Law Commission's remit.

8 As happened in reaction to the Domicile Bill introduced in 1958: see para. 1.7 below.

1.5 Although the concept of domicile has been widely used in statutes, the law of domicile consists largely of case law, the principal exception being the Domicile and Matrimonial Proceedings Act 1973.[9] The question of whether reform should be in the form of a statutory code or simply comprise statutory amendment of the existing common law is a matter on which we would like to receive comment. Our provisional view is that a code of the main rules which determine a person's domicile would be desirable, but that it should not seek to redefine concepts and terms which are currently used nor should it go into such detailed matters as the extent to which United Kingdom law should recognise federal domiciles created under foreign legislation for specific purposes such as jurisdiction in matrimonial proceedings.[10]

HISTORY OF THE REFORM OF THE LAW OF DOMICILE IN THE UNITED KINGDOM

1.6 The call for reform of the law of domicile is not a recent development. Modern attempts to achieve it date back to 1952 when the Private International Law Committee was set up to consider "what amendments are desirable in the law relating to domicile...".[11] The Committee reported in 1954[12] proposing that the law of England and Wales and Scotland should conform with the principles set out in a Code

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9 See para. 1.8 below and paras. 3.4 and 8.3.

10 For example the Australian Matrimonial Causes Act 1959 (now replaced by the Family Law Act 1975) which created an Australian domicile for the purposes of matrimonial proceedings. It is thought that such a domicile would be recognised "in appropriate contexts" (McClean, Recognition of Family Judgments in the Commonwealth (1983) p.5) when a person's domicile falls to be determined by a court in another country, although the general rule is that domicile is a matter for the law of the forum and a federal domicile is not known to the common law (Smith v Smith 1970 (1) S.A. (Rhodesia H.Ct.)).

11 First Report of the Private International Law Committee (1954) Cmd. 9068, para. 2.

12 Ibid.

appended to the Report. The two particular defects in the present law which it identified were[13]:-

(a) the importance attached to the domicile of origin (in particular, the rule in Udny v. Udny[14] that the domicile of origin revives when a domicile of choice is abandoned without another such domicile being acquired) and the heavy burden of proof resting on those who assert that a domicile of origin has been changed; and

(b) the difficulties involved in proving the intention required to change a domicile.

The Committee recommended that these defects be cured by legislation abolishing the revival of the domicile of origin and establishing certain rebuttable presumptions as to a person's domicile, principally, that a person should be presumed to intend to live permanently in the country in which he had his home.[15]

1.7 In 1958 a Private Members' Bill to give effect to the Report was introduced in the House of Lords. It was opposed on behalf of the foreign business community who feared "unforeseen and unpredictable consequences in the field of taxation",[16] in particular, that the new presumption might make it harder for members of that community to retain their foreign domicile and so might make them liable to pay United Kingdom income tax and estate duty. It was clear that neither the Committee nor the Bill intended that the presumption should be too difficult to rebut. However, the possibility that the United Kingdom

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13 Ibid., paras. 8, 9 and 14.

14 (1869) L.R. 1 Sc. & Div. 441.

15 Ibid., n.11 above, para 15, and Appendix A, Article 2.

16 Hansard (H.L.) 1958, vol. 211, Cols. 206-209.

might lose the services, business and capital of foreign businessmen was taken seriously and in 1959 a second Bill, which omitted any presumption as to domicile, was introduced in place of the first. That Bill was, however, dropped by its sponsors as its chances of success had been severely reduced by the controversy which had been aroused.[17] Later the same year, the law of domicile was again referred to the Private International Law Committee for reconsideration in the light of the objections taken to the two Domicile Bills. The Committee reported in 1963[18] reaffirming its original recommendations but with the addition of a "Businessman's Formula" which would have exempted businessmen from the presumption: the Committee, however, concluded that if businessmen were excluded from the effects of any legislation the changes would be hardly worth making and that, in any event, the Formula would probably not entirely allay hostility to the measure.[19]

1.8 The Private International Law Committee also considered the domicile of married women[20] and concluded that to enable women to acquire an independent or separate domicile from their husbands for all purposes would "involve legal complications outweighing any advantages that might accrue."[21] This aspect of the law of domicile was, however,

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17 For an account of the legislative progress of the two Domicile Bills see Mann, (1959) 8 I.C.L.Q. 457 and the correspondence section of The Times during March and April 1959, in particular, 2,13 and 31 March, 2 & 13 April and also Lord Shawcross, "Law Relating to Domicile", The Times 3, 4 June 1959.

18 Seventh Report of the Private International Law Committee (1963) Cmnd. 1955: Law of Domicile.

19 Ibid., paras. 17 and 34(3).

20 First Report (1954) Cmd. 9068 paras. 17 & 18 and Seventh Report, Cmnd. 1955, paras. 20-33.

21 Seventh Report, ibid., para. 34(6).

subsequently taken up by a Departmental Committee in 1972[22] whose proposals were enacted in the Domicile and Matrimonial Proceedings Act 1973, section 1 of which abolished a wife's dependent domicile.[23]

1.9 Other changes in the law of domicile which were effected by that Act are contained in sections 3 and 4 and relate to the age at which an independent domicile can be acquired and to the domicile of children not living with their fathers. The effect of these provisions can be seen from the summary of the present law in Part III of this paper.

REFORM OF THE LAW OF DOMICILE IN OTHER COUNTRIES

1.10 Since the failure in 1958 to achieve major reform of the law of domicile in the United Kingdom, important proposals and changes have been made in other parts of the Commonwealth.[24] The Canadian Uniform Law Commissioners produced a Model Domicile Code[25] in the early 1960s based on a single definition of domicile which would apply to all persons including children and the mentally incapable. The Code, in effect, abolishes the concept of the domicile of origin and of dependence and introduces a new domicile based on the place where a person has his principal home and intends to reside indefinitely. This Code has not, however, been adopted by any province.

1.11 Two of the most notable reforms that have taken place in recent years have occurred in Australia and New Zealand where, amongst other things, the doctrine of the revival of the domicile of origin has been

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22 Comprising representatives of the two Law Commissions, the Lord Chancellor's Department and the Scottish Office.

23 In England and Wales, Scotland and Northern Ireland.

24 For a detailed discussion of the Commonwealth position see McClean, Recognition of Family Judgments in the Commonwealth (1983) ch.1.

25 Ibid., p. 18.

abolished, New Zealand going so far as to dispense with the concept of the domicile of origin altogether. Since these reforms provide the most useful comparative models for our own proposals, we have reproduced the basic statutory provisions in Appendix B. Similar provisions have been subsequently adopted by other Commonwealth countries.[26]

1.12 In 1983 the Law Reform Commission of Ireland published a Report[27] which recommended that domicile, as a connecting factor in the conflict of laws, should be replaced by habitual residence. Habitual residence is widely used as a connecting factor in countries of continental Europe and in international conventions (especially those emanating from the Hague Conference on Private International Law). It has also been adopted in a number of United Kingdom statutes (for example, the Recognition of Divorces and Legal Separations Act 1971 and the Domicile and Matrimonial Proceedings Act 1973) as a factor supplementary to domicile. So far, only Nauru, one of the smallest Commonwealth jurisdictions, has actually legislated[28] to replace domicile with habitual residence.

1.13 These proposals and changes confirm us in our view that the time has come to reconsider the state of the law of domicile in the United Kingdom.

ARRANGEMENT OF THE PAPER

1.14 We begin this paper by discussing alternatives to domicile as a connecting factor and go on to outline the present rules governing domicile. We then identify possible defects in these rules and discuss various proposals for reform. Finally, we summarise our provisional conclusions.

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26 Ibid., ch. 1.

27 On Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC7-1983).

28 Conflict of Laws Act 1974: See McClean, n. 24 above, pp. 31-32.

PART II

ALTERNATIVE CONNECTING FACTORS TO DOMICILE

INTRODUCTION

2.1 Given that many people move about the world from one country to another, it is essential to have a means of establishing under which system of law and within the jurisdiction of which country's courts questions relating to their civil status (such as marriage, divorce and legitimacy) and some aspects of their property (such as the devolution of moveable property on their intestacy) fall to be determined. It is to accomplish that purpose that the concept of domicile has been developed. Its essential feature is that it attempts to connect a person so far as it is possible with the country in which he has his permanent home or in which he lives indefinitely. Though domicile is used as the fundamental connecting factor in Ireland, the United States of America, Denmark, Norway, Brazil and the United Kingdom and other Commonwealth countries, different connecting factors, and in particular nationality and habitual residence, are preferred by other countries and by some commentators. It is not the purpose of this part of our consultation paper to ask whether those other connecting factors are satisfactory in themselves or whether it is desirable for them to be used as alternatives to domicile in particular cases.[29] Rather, the purpose is to consider whether any one of those other connecting factors would be sufficient and appropriate to determine with which legal system an individual should be connected for all purposes so that the general use of the concept of domicile could be abandoned in the legal systems of the United Kingdom.

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29 For example, the Recognition of Divorces and Legal Separations Act 1971 and the Domicile and Matrimonial Proceedings Act 1973 both use habitual residence as well as domicile.

HABITUAL RESIDENCE[30]

2.2 As we have already noted,[31] though the concept of habitual residence already appears in United Kingdom legislation and has been employed increasingly as a connecting factor in international conventions, it has been adopted as a general substitute for domicile only in Nauru,[32] a precedent which the Irish Law Reform Commission have recently recommended should be followed in Ireland.[33] The advantages claimed for habitual residence over domicile by its proponents are that it is

(a) generally easier to establish than domicile because it is less dependent on the intention of the person concerned;

(b) simpler to explain to the layman and hence an easier concept than domicile for administrative officials to use; and

(c) applicable directly to all persons without the need for a complicated concept such as the domicile of dependency to connect a child with a system of law.

2.3 The major criticism of habitual residence is that as a connection between a person and a country it is not sufficiently strong to justify the person's civil status and affairs always being determined according to the law and by the courts of that country. The point can be illustrated by the position of persons working or living abroad for prolonged but temporary periods.

Take, for example, A, an English domiciled oil man working in Saudi Arabia on a long term contract. If habitual residence

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30 See Dicey & Morris, The Conflict of Laws 10th ed. (1981) (hereinafter referred to as 'Dicey & Morris') pp. 141-146, and Choice of Law Rules in Marriage (1984) Working Paper No. 89 and Consultative Memorandum No. 64, paras. 3.29-3.31.

31 See n. 29 above.

32 See n. 28 above.

33 See n. 27 above.

were adopted in place of domicile and were the sole connecting factor then, for example:

(a) the law governing the essential validity of any marriage contracted by A while habitually resident in Saudi Arabia and the legitimacy of any issue would be that of Saudi Arabia;

(b) if already married, A, while habitually resident in Saudi Arabia, might be precluded from seeking matrimonial relief in the English courts were his marriage to break down; and

(c) if A died intestate while habitually resident in Saudi Arabia the rights of succession to his moveable property would be governed by Saudi Arabian law.

In short, the exclusive use of habitual residence would sever the links between many temporary expatriates and their homeland, cutting them and their dependants off from its law and courts despite their remaining closely connected with that country.[34] The results would be particularly dramatic where the cultural background of the country of habitual residence, as reflected in its law, was very different or even alien to the culture of the person's home country.

2.4 A further objection to substituting habitual residence for domicile (as opposed to using it as an alternative connecting factor) is its allegedly underdeveloped state as a legal concept.[35] As the Irish

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34 See the discussion at paras. 17-26 and 37-47 of the Report on Jurisdiction in Matrimonial Causes (1972) Law Com. No. 48, which concluded that the jurisdiction governing a person's right to seek matrimonial relief in the English courts should continue to be available to persons domiciled in England and Wales and be extended to those habitually resident there. This recommendation was implemented in the Domicile and Matrimonial Proceedings Act 1973.

35 See resolution (72) 1 and Annex adopted by the Committee of Ministers of the Council of Europe on 18 January 1972 and Explanatory Memorandum on Standardisation of the Legal Concepts of "Domicile" and of "Residence".

Law Reform Commission recognised[36] there is no judicial consensus about the degree of importance which is to be given to intention in determining whether residence is habitual, nor is it clear how long residence must persist to become habitual. Further, it has been argued that a person may have more than one habitual residence, or, indeed, none. In these circumstances, it might well be regarded as undesirable to substitute habitual residence for domicile unless special statutory provision were made to clarify the part played by intention and length of residence in establishing whether a residence was habitual and to cover cases where in fact a person might have no habitual residence or have more than one. In any event, if legislation did not make such provision at the outset it is beyond question that the courts would have to do so subsequently. Surrounding habitual residence with such provisions, especially if they were also aimed at meeting the difficulties of expatriates raised in paragraph 2.3 above, would seriously risk jeopardising the simplicity of the present concept and its claimed advantages. Furthermore it might make it more difficult in the future to use habitual residence as a simple and appropriate alternative or supplement to domicile as a connecting factor.

2.5 In these circumstances, whilst we can see that there may be particular types of cases where habitual residence is at least as appropriate as domicile, our provisional view is that it could replace domicile generally only at the expense of creating unacceptable results, especially in relation to expatriates. And though it has been claimed that habitual residence

> "appears to be the most appropriate available concept to meet the demands of a fluid, modern society"[37]

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36 Irish Law Reform Commission Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws, para. 20(2).

37 Graveson, Conflict of Laws 7th ed., (1974) p.194.

in our view the greater fluidity of modern society, and especially the increasing trend for businessmen and others to serve tours of duty abroad, calls not so much for a concept which allows their and their families' civil status and rights to fluctuate as they move from country to country, but rather for a concept which, without undue rigidity, promotes a stable legal background against which such people can conduct their domestic affairs. In our provisional view, domicile, especially if amended in the ways we propose later in the consultation paper, is better suited and more likely to achieve that end in many circumstances than is habitual residence.

NATIONALITY[38]

2.6 In the 19th century nationality replaced domicile as a connecting factor in most countries of continental Europe from where its use has spread to Japan and to some South American states. As the Law Commission pointed out in their Report on Jurisdiction in Matrimonial Causes,[39]

> "the vast majority of persons do have a close connection with the state of which they are nationals. If "belonging" is the test, nationality occupies a position very close to that now filled by domicile and is entitled to consideration as a basis of jurisdiction".

The claimed advantages for nationality over domicile are that :

(a) it is a concept more easily understood by laymen and lawyers alike;

(b) it is more easily ascertained and proved, not least because when it is changed the process is usually a public and conscious act of record whether involving the direct process of naturalisation or a marriage which brings a new nationality in its wake; and

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38 See Dicey & Morris, pp. 146-148, and Choice of Law Rules in Marriage, ibid., n. 20, paras. 3.25-3.26.

39 Law Com. No. 48 (1972) para. 19.

(c) because taking up a new nationality usually involves consent on the part of both the person and the country, the connection created by it and its consequences are less susceptible to criticism by those whose rights are affected by the change.

2.7 Though adopting nationality as the prime connecting factor in place of domicile would not affect temporary expatriates in the same adverse way as adopting habitual residence would, it would nonetheless have major drawbacks as a substitute for domicile, namely :

(a) there would have to be special rules (perhaps based on domicile) to deal with stateless persons and those with more than one nationality;

(b) special rules would also be necessary in federal or composite states, including the United Kingdom, where nationality alone would not indicate with which of the countries comprising the state the person was to be connected;

(c) so far as the United Kingdom is concerned, nationality would be particularly unattractive given the complex state of our law in that respect; and

(d) because nationality is not dependent on residence its use would increase the risks of connecting a person with a country which he may never have visited, let alone have lived in on a long term basis.

2.8 Having weighed the arguments, our provisional conclusion is that, whilst in general nationality is a proper test of political status and allegiance, domicile, based on the idea of the country where a person has his home, is a more appropriate concept for determining what system of law should govern his civil status and certain aspects of the administration of his property. Whilst we would not wish to preclude the

use of nationality as an alternative or supplementary connecting factor to domicile in our law, we are not persuaded that it would be a sufficient or appropriate general substitute for it.[40]

CONCLUSION

2.9. As we have indicated we are not here concerned to answer the question "is habitual residence or nationality a satisfactory connecting factor?". Rather, in the context of this consultation paper, the question is "would it be desirable to abolish or discontinue totally the use of domicile as the connecting factor and replace it generally with habitual residence or nationality?". Our provisional view is that the answer to that question must be "no". Accordingly we propose that domicile should continue to be used as a connecting factor in the laws of England and Wales, Scotland and Northern Ireland. In the rest of this consultation paper we shall examine the present law of domicile and make provisional proposals for its reform.

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40 Nationality was considered and rejected as a possible connecting factor in the Report on Jurisdiction in Matrimonial Causes, ibid., n. 39, paras. 19-26.

PART III

OUTLINE OF THE PRESENT LAW

INTRODUCTION

3.1 It is not our purpose in this paper to give a definitive account of the law of domicile in the United Kingdom. Such accounts are more than adequately provided in the leading text books on private international law.[41] We therefore set out existing rules only so far as is necessary to a proper understanding of the difficulties in the existing law. As we have said,[42] the essential feature of domicile is to connect a person with the country in which he has his home permanently or indefinitely. The specific rules, however, do not always, and in many cases cannot, achieve that end simply because some people have no home or no settled home in any particular country. Subject to what is said in paragraph 3.2, by "country" is meant a geographical area governed by a single system of civil law, or a "law district" as it has been described.[43] Hence, a composite state, such as the United Kingdom, or a federal state such as Australia, contains a number of countries, for example, England and Wales, Scotland and Northern Ireland in the United Kingdom and New South Wales and Queensland in Australia.

3.2 Whatever the nationality or foreign connections which a person may have, his domicile is determined according to the rules of the law of the forum.[44] In United Kingdom law the rules for determining a

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41 See Dicey & Morris, ch. 7, Rules 4-16; Cheshire and North, Private International Law 10th ed. (1979), ch. VII and Anton, Private International Law (1967) (hereinafter referred to as "Anton"), ch. 6.

42 Para. 2.1 above.

43 Dicey & Morris, pp. 23-24.

44 Dicey & Morris, Rule 8: "For the purposes of an English rule of the conflict of laws, the question where a person is domiciled is determined according to English law."

person's domicile operate generally to ensure that every person has a domicile, and only one domicile, at all times. There are, however, examples of statutory intervention in areas such as divorce jurisdiction which create super-domiciles in federal or composite states covering all the constituent countries. For example, for the purpose of matrimonial jurisdiction, Australian legislation has created an Australian domicile.[45] Hence in Australia a person can have two domiciles, one for matrimonial causes and the other for other issues.

3.3 In the rest of this Part we outline the rules by which a domicile is attributed to or can be acquired by various classes of person, beginning with the new born child and working our way through childhood to adulthood, including the domicile of those adults who lack the capacity to acquire a domicile of choice.

DOMICILE OF CHILDREN

3.4 A person receives at birth a domicile of origin which it appears is determined as follows:[46]

(a) a legitimate child born during the lifetime of his father has his domicile of origin in the country of his father's domicile at the time of his birth;

(b) a legitimate child born after his father's death, or an illegitimate child, has his domicile of origin in the country of his mother's domicile at the time of his birth; and

(c) a foundling has his domicile of origin in the country in which he is found.

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45 See n. 10 above.

46 Dicey & Morris, Rule 9, p. 108. See also Anton, pp. 167-168.

Thereafter, unless the child is adopted (when it appears that he may receive a new domicile of origin derived from the appropriate adoptive parent)[47] the domicile of an unmarried child under the age of 16[48] (or 14 or 12 respectively for boys and girls under Scots law) may be changed only if the parent on whom the child's domicile depends changes his or her domicile.[49] Subject to the exception in section 4 of the Domicile and Matrimonial Proceedings Act 1973, this so called domicile of dependency appears to be determined as follows:[50]

(a) a legitimate child's domicile is the same as, and changes with, the domicile of his father during the father's lifetime; and

(b) subject, perhaps, to the mother's right to elect whether the child's domicile shall change with hers,[51] the domicile of an illegitimate child and of a child whose father is dead is the same as, and changes with, that of his mother.

The statutory exception in the 1973 Act provides that the dependent domicile of a legitimate child[52] whose parents are living apart, or who were living apart when the mother died, is determined as follows:

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47 On the basis that an adopted child is treated as if it had been born the legitimate child of its adoptive parents: Children Act 1975, Sch. 1 para. 3 (prospectively repealed and re-enacted in the Adoption Act 1976 s. 39(1)) and the Adoption (Scotland) Act 1978, 39(1): see Dicey & Morris, p. 109. Bromley, Family Law 6th ed. (1981), however, at p.12, takes the view that an adopted child's domicile of origin does not change.

48 By s.3 of the Domicile and Matrimonial Proceedings Act 1973, which applies to England and Wales and Northern Ireland (but not Scotland), a person is only capable of acquiring an independent domicile having attained the age of 16 or married under that age.

49 Dicey & Morris, Rule 14, p.130.

50 Ibid., Rule 15, p. 133; Anton, pp. 170-172.

51 Re Beaumont [1893] 3 Ch. 490. See also Blaikie, "The Domicile of Dependent Children: A Necessary Unity?" 1984 Jur. Rev. 1.

52 This includes an adopted (see n. 47 above) and a legitimated child.

(a) if he has his home with his mother and has no home with his father, the domicile of the child is the same as, and changes with, that of his mother;

(b) if sub-paragraph (a) has applied to him at any time and he has not since had a home with his father, the domicile of the child is the same as, and changes with, that of his mother; and

(c) if at the time of his mother's death, his domicile was dependent on hers by virtue of sub-paragraphs (a) or (b) and he has not since had a home with his father, the domicile of the child is that of his mother on her death.

DOMICILE OF ADULTS

3.5 On reaching the age of 16 (or 12 or 14 if a girl or boy respectively in Scotland) or marrying thereunder,[53] a person remains domiciled in the country in which he was domiciled immediately before either event[54] unless and until he abandons that domicile and either:

(a) acquires a domicile of choice or

(b) his domicile of origin revives.[55]

Domicile of Choice

3.6 An adult can acquire a domicile of choice only by a combination and coincidence of:[56]

(a) residence in a country; and

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53 As the minimum age for marriage in the United Kingdom is 16 this rule is only relevant in the case of a marriage abroad by a person domiciled in a country permitting very early marriage, as was the case, for example, in Mohamed v Knott [1969] 1 Q.B.1. See also paras. 4.31-4.32.

54 In the Goods of Patten (1860) 6 Jur. (N.S.) 151; Re Macreight (1885) 30 Ch. D. 165; Gulbenkian v Gulbenkian [1937] 4 All E.R.618.

55 Henderson v Henderson [1967] P.77.

56 Dicey & Morris, Rule 10, p.110; Anton, pp. 174-179.

(b) an intention to make his home in that country permanently or indefinitely.

Residence in this context seems to involve little more than mere physical presence in a country, and a period of days or even less can be sufficient provided that physical presence is accompanied by an intention to make a home in the country from that time on.[57]

3.7 As to the required intention, at its most rigorous it has been said that the intention necessary to acquire a domicile of choice must amount to "a fixed and settled purpose" - " a determination" - "a final and deliberate intention"[58] to abandon the country of the erstwhile domicile and settle in the new country of residence. In other words, an unequivocal and positive intention not to remain and an intention to remain respectively are required. Hence, on that basis, if the person does not direct his mind positively and consciously to the question of where his permanent home is, or if he retains some hope of returning one day to the country of his erstwhile domicile,[59] the intention necessary to acquire a new domicile may not be present. More recent authorities, however, appear to have relaxed the rules. For example,[60] it has been said that an intention to return to a country in the event of an unlikely contingency, such as a major win on the football pools,[61] would not prevent the

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57 Fasbender v. Attorney-General [1922] 2 Ch. 850 and White v Tennant 31 W.Va. 790; 8 S.E. 596 (1888).

58 Bell v Kennedy (1868) L.R. 1 Sc. & Div. 307, 321 per Lord Westbury; Ibid., p.314 per Lord Cairns; and Douglas v Douglas (1871) L.R. 12 Eq. 617, 645 per Wickens V-C; cited, with approval, by Lord Macnaghten in Winans v Attorney-General [1904] A.C. 287, 291-2.

59 Winans v Attorney-General [1904] A.C. 287; Jopp v Wood (1865) 4 De G.J & S. 616.

60 See also Gulbenkian v Gulbenkian [1937] 4 All E.R. 618, 627 per Langton J: "The intention must be a present intention to reside permanently, but it does not mean that such intention must necessarily be irrevocable. It must be an intention unlimited in period, but not irrevocable in character".

61 In the Estate of Fuld (No. 3) [1968] P. 675, 685 per Scarman J.

person having the requisite intention to make his home permanently or indefinitely in the country in which he is resident. And a negative intention, in the form of an absence of an intention either to return and settle in an erstwhile country of domicile, or to settle in a third country, has been held to be sufficient to enable a person to acquire a domicile in the country in which he is currently resident.[62]

Burden and Standard of Proof

3.8 The burden of proving that there has been a change of domicile falls on the person alleging that a change has occurred.[63] In discharging that burden where the competition is between a domicile of origin and one of choice, it appears that under English law a standard of proof more onerous than the balance of probabilities generally required in civil matters may have to be satisfied,[64] and the necessary elements of residence and intention must be shown with "perfect clearness and satisfaction"[65] to the court. In Scots law it seems likely that the ordinary standard of proof on a balance of probabilities applies.[66]

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62 Re Flynn [1968] 1 W.L.R.103.

63 This, of course, merely illustrates the general rule of evidence that conditions proved to have existed are presumed to continue in existence.

64 Winans v Attorney-General [1904] A.C. 287; Ramsay v Liverpool Royal Infirmary [1930] A.C. 588; Henderson v Henderson [1967] P.77, 80.

65 Bell v Kennedy (1868) L.R. 1 Sc. & Div. 307, 321 per Lord Westbury.

66 Although there is old Scottish authority (e.g. Steel v Steel (1888) 15 R. 896; Main v Main 1912 1 S.L.T. 493) to the effect that a particularly heavy onus of proof lies on a person alleging a change from the domicile of origin to one of choice, the courts have, in recent times, been unwilling to recognise any civil standard of proof other than the usual one of proof on the balance of probabilities. It seems likely that this standard would now apply: cf. Lamb v Lord Advocate 1976 S.C.110.

Revival of the Domicile of Origin

3.9 If a person abandons one domicile of choice (by ceasing to reside in a country and losing the intention to make his home there permanently or indefinitely) without immediately acquiring another domicile of choice, his domicile of origin automatically revives irrespective of where he is or what he may intend for the future.[67] This rule ensures that every person has a domicile at all times.

DOMICILE OF AN INCAPAX

3.10 Under the law of England and Wales and of Northern Ireland it appears that the domicile of an adult incapax is determined as follows:[68]

(a) if his incapacity pre-dates his sixteenth birthday his domicile thereafter continues to be determined as if he were an unmarried person under 16, but

(b) if the onset of his incapacity post-dates his sixteenth birthday or marrying thereunder[69] his domicile remains that which he had immediately before the onset of his incapacity.

In Scots law it seems likely that the domicile of an incapax is the domicile he had on reaching the age of 12 or 14 or at the onset of his incapacity, whichever is the later. Certainly, so long as he is incapable of forming the necessary intention he cannot abandon an existing domicile or acquire a new domicile of choice.[70]

3.11 There is no authority on the degree or nature of the mental incapacity which renders a person of full age incapable of acquiring a

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67 Udny v Udny (1869) L.R. 1 Sc. & Div. 441.

68 Dicey & Morris, Rule 16.

69 See n. 53 above.

70 Anton, pp. 174 and 177.

domicile of choice. It has been suggested[71] that a person loses that capacity only where there is an order in force or some form of official constraint relating to his mental state. This, however, is inconsistent with the approach to mental incapacity in other areas of private law and would have some unfortunate consequences.[72] The better view would seem to be that it is a question of fact in each case whether a person is capable of forming the intention to make his home in a country permanently or indefinitely.[73]

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71 Dicey & Morris, p.140.

72 See para. 6.8 below.

73 Ibid., n. 71 above.

PART IV

DOMICILE OF CHILDREN

INTRODUCTION

4.1 As we explained in Part III, a child receives at birth a domicile of origin in the country in which his appropriate parent is domiciled at the time of his birth, or, if a foundling, in the country in which he is found. Thereafter, until the child reaches the age of 16[74] (or marries thereunder) his domicile changes, if at all, with the domicile of the parent on whom his domicile is in law dependent. The present state of the law appears to us to pose two major questions. First, what need or advantage is there in retaining two sets of rules, one for determining a person's domicile of origin at birth and another for determining a person's domicile during childhood, namely his domicile of dependency? Second, is there any case for according some or all children a domicile independent of their parents? We deal with these questions in reverse order, however, as the need to retain two sets of rules must to a large extent depend on how appropriate the rules governing a person's domicile throughout childhood are for attributing a domicile to a child at the moment of birth. In addition, we consider in this Part the existing and proposed powers of parents and the courts to override the general rules governing children's domiciles,[75] the domicile of under-aged mothers and the different age limits of dependency in England and Wales and Northern Ireland, and in Scotland.

DEPENDENCE v INDEPENDENCE

The Issues

4.2 One limitation of the existing law governing the domicile of children is that, if a child is abandoned (in the sense that the identity or

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74 In Scotland 12, in the case of a girl and 14, if a boy; see paras. 4.31-4.33 below and see n. 53 above.

75 First Report of the Private International Law Comittee (1954) Cmd. 9068, paras. 19-21.

whereabouts of his parents is not known) or his parents die, his domicile (whilst a minor) becomes frozen no matter what change may subsequently occur in his circumstances.

> Take, for example, a baby, A, who is taken from England to New Zealand with his emigrating parents and whose domicile changes with theirs from England to New Zealand. Shortly after arrival, the parents are killed in a motor accident and A is returned to England to be brought up by his grandparents. Under existing law, A would remain domiciled in New Zealand and his right to marry and the distribution of his moveable property on intestacy would, for example, be governed by the law of New Zealand until he was capable as an adult of acquiring a domicile of choice in England, irrespective of the fact that after his return to England he had no further connection with New Zealand.

Another alleged drawback of dependency is that the child's domicile may continue to follow that of the parent despite estrangements such as the child being taken into the care of a local authority or going to live permanently with a third party, whether under a private arrangement or a court order in respect of his custody.

4.3 These alleged shortcomings in the present law might be avoided by according all children an independent domicile determined by reference, for example, to their habitual residence or the country of their closest connection. So radical a change would, however, itself produce questionably desirable results in some types of case.

> Take, for example, a baby, B, born to Scottish domiciled parents in Iran whose work will keep them and B in that country throughout most, if not all, of B's childhood. In such circumstances, if B were accorded a domicile independent of his parents it would seem almost beyond question that, whatever criterion were used to determine it, it would be an Iranian domicile despite his family's connection with Scotland.

It might, we suppose, be argued that, if B's domicile were determined on the basis, for example, of something as broad as the country of his closest connection, a court might decide that his family connection with Scotland overrode the fact that he had never entered that country or was never likely to do so during his childhood. However, in so doing a court would be virtually re-creating the domicile of dependency by a circuitous and less certain route.

4.4 Given what seem to be shortcomings in any absolute rule of dependence or independence for governing the domicile of children, we have looked for a middle way which would preserve the dependency where the link between child and parents was continuing, but allow the child whose links with his parents have been weakened or extinguished to receive a domicile independent of theirs. In pursuing our inquiry, we consider first the most common case, namely the child who has his home with both or one of his parents. We then consider the position of the remaining children who do not have a home with their parent or parents, including abandoned children and orphans.

Children who have a home with Both or One of their Parents

4.5 In the case of the child who lives or has his home with one or both of his parents it seems appropriate that he should be domiciled in the same country as his parent or parents. That approach, however, raises the question of what domicile a child should receive if he has his home with both parents but their domiciles are different or if he has his home with only one of his parents.

Children who have a Home with Both Parents

4.6 Where a child has his home with both parents but they have different domiciles the most obvious means of breaking the deadlock might seem to be an arbitrary rule favouring the domicile of either the father or the mother. As between them, it might be said that, whatever the current view on the equality of the sexes within marriage, in practice, in most two parent families the father remains the major breadwinner on

whom the other members of the family depend economically. In addition, his job is often the single most important factor in deciding where the family home should be. That having been said, it is a fact that at birth mother and child are together and the child is usually dependent on the mother for some considerable time thereafter. Further, if the family is separated then or later, whether temporarily (for example, when the father is working abroad) or permanently, (by divorce) the children are more likely to remain with the mother than the father. It might, therefore, be argued that in order that the child's domicile should most often reflect where and with whom he has his home in fact and in order to minimise the number of cases in which the separation of the parents causes a change in the child's domicile, it is best to favour the mother's domicile from the outset. A further argument favouring the mother is that she has parental rights under the general law in respect of all her children while a father's rights are limited to his legitimate children only.[76] It could be contended that it would be inappropriate to make the domicile of an illegitimate child who has his home with his mother and father dependent on the parent with whom he has no other legal relationship. Finally, as a matter of principle and practice, we consider that it would be a major advance if the rules governing the domicile of legitimate and illegitimate children were the same.

4.7 We have considered whether, rather than resorting immediately to a rule favouring one parent, an intermediate tie-breaking rule might, for example, provide either that:

(a) where the child's habitual residence coincides with one parent's domicile the child should have that domicile or

(b) the child should be domiciled in the country of the parent's domicile with which it is most closely connected.

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76 Guardianship Act 1973, s.1(1) (as amended by the Domestic Proceedings and Magistrates' Courts Act 1978, s.36(2)), s.1(7) and Children Act 1975 s.85(7). For Scotland, see ss. 10(1) and (6) of the 1973 Act and also the Scottish Law Commission's Report on Illegitimacy (1984) Scot. Law Com No. 82, recommendations 2,4 and 9-11.

There are, however, drawbacks to both those suggestions and neither is certain to produce a better result than immediate resort to a somewhat arbitrary rule. As regards a tie-breaking rule based on the coincidence of the child's habitual residence with a parent's domicile, it would not help in cases where there was no such coincidence. In such cases final resort would still have to be had either to a rule favouring one parent's domicile or, perhaps, to a test of closest connection. If a rule, such as one favouring the mother's domicile, were used as a final resort the result might often be difficult to justify.

> Take, for example, a child, C, whose mother has a Scottish domicile and whose father has an English one. The father, a British diplomat, serves alternating tours of duty at the Foreign and Commonwealth Office in London and abroad. In that case, C's domicile would fluctuate between being English when he and his parents were living in England (his habitual residence coinciding with his father's domicile), and being Scottish when living abroad (if the arbitrary rule favoured the mother's domicile).

To demonstrate that the same problem would occur even if the father's domicile were favoured in the last resort, the reader need only envisage facts similar to those stated in the above example but where the parents' domiciles are reversed.

4.8 A closest connection rule, whether as a primary tie-breaker or as a rule of final resort, would also not necessarily produce an appropriate result.

> Take, for example, a child, D, born to American parents who, as postgraduate students, are living and studying in Scotland. One is domiciled in Nebraska, the other in Arkansas and though they intend eventually to return to the United States they have yet to decide in which state of the Union they will live. In such a case, treating D as more closely connected with Nebraska or with Arkansas in preference to the other or,

indeed, to any other state would be artificial and unlikely to be any improvement on a rule favouring one parent's domicile.

We are also conscious of the fact that, whilst there would be occasional individual cases where the closest connection test would be preferable to a rule favouring the mother's domicile, it would inevitably carry with it a relatively high degree of uncertainty for those who must advise on or administer the law and who in practice cannot have constant resort to the courts. Accordingly its introduction would have to be justified by some clear and compensating improvement in the law and its practice.

4.9 Given the small number of cases in which a tie-breaking rule would be necessary and the even smaller number of cases in which a rule based on habitual residence or closest connection would produce a better result than a rule favouring one parent's domicile, we are not persuaded that the complexity and uncertainty which they would import into the law could be justified. Accordingly, we propose that the domicile of a child who has a home with both his parents should be the same as and change with the domicile of:

(a) his parents where their domiciles are the same or

(b) his mother if the parents' domiciles are different.

Such a provision would, in effect, reverse the present rule that a legitimate child's domicile is the same as his father's unless he lives with his mother alone.

Children who have a Home with One Parent

4.10 Turning to the child who lives with only one parent and following the logic of what we have already said (and following, incidentally, the principle underlying section 4 of the 1973 Act), we think that it would be appropriate that the domicile of such a child should be dependent on that parent. Our only possible reservation is in respect of an illegitimate child who has a home with his father. In such a case it might be argued that in the absence of any underlying legal relationship

between the child and his father it would be inappropriate that the child's domicile should be dependent on his father. In practical terms, however, we see little difference between a child living alone with a father who has not married the mother and a child living alone with a father who has married the mother. And, in terms of principle, we consider it would be difficult to justify discriminating between legitimate and illegitimate children and their fathers in this context.[77]

Children Who Do Not Have a Home With Both Parents or Either Parent

4.11 The category of children who do not have a home with one or both parents includes orphans, those whom we have referred to as abandoned[78] and those who otherwise live separately from their parents under private or official arrangements such as under a court order.[79] As is apparent from what we said in paragraph 4.2, the mischief, if it be such, in the existing law in relation to the orphaned and the abandoned child and children who are merely living separately, arises from different causes. In the former case, it is the immutability of the child's domicile which gives rise to the risk of the child having an inappropriate domicile. In the latter case, the risk of the child receiving an inappropriate domicile arises from the continuing dependence on the parent's domicile even after the parent and child have ceased to have a home together and perhaps after the child's links with his parents have been weakened or severed, for example, by the child being taken into the care of a local authority or given into the legal custody of another individual in order to preserve his welfare.

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77 See also Working Paper No. 74 (1979) and Law Com. No. 118 (1982) on Illegitimacy, Parts VIII and XIII, respectively.

78 See para. 4.2 above.

79 See para. 4.17 below for a discussion of the concept of living at home.

4.12 To answer the criticism of the present law as it relates to children not living with their parents, it might be thought desirable to make the domicile of such children dependent on the adult with whom in fact they have their home. Such a solution would, however, give rise to major problems.[80] To begin with there are children who do not have a home with any particular adult. In addition, where the child had his home with more than one adult and they had different domiciles it would be difficult to devise workable and appropriate tie-breaking rules, given that the relationship of the adults to the child and to each other might be anything - for example, sibling, uncle, aunt, cousin or stranger. Further, the adults might be of the same or different sex. Another approach might be to provide that the child's domicile should follow the parental rights and be dependent on the person who has custody of him.[81] However, given that the parental rights may be divided between or conferred jointly on two people and that they may be granted to persons other than the parents, similar problems to those outlined above in this paragraph would arise. Finally, as it is not unusual for a person who has custody of a child to live separately from him or for parental rights to be assumed by local authorities, to make a child's domicile dependent on the domicile of the person having parental rights over him might result in continuing and increased artificiality. Accordingly, we have rejected this solution.

Basis of an Independent Domicile

4.13 If it is accepted in principle that a child who does not have a home with his parent or parents should have a domicile independent of them, the question of how to determine that domicile arises. Broadly, there would seem to be three options. The first would be to adopt the rules used to determine the domicile of adults: the second would be to

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80 In the United States such a child's domicile appears to be capable of change by "natural guardians": Restatement of the Law Second, Conflict of Laws (1971) §.22, comments h & i, and Leflar, American Conflicts Law 3rd ed. (1977) Ch. 2, s.12.

81 As in the American Restatement, Second, ibid., §.22, comment d, where the child is in the custody of a parent.

use a test of residence: the third would be to employ a wide embracing test, such as deeming the child to be domiciled in the country with which he is most closely connected.

4.14 A vital element in the rules governing the domicile of adults is the intention to make a home indefinitely in the country of residence. It follows that such rules could not operate in respect of young children who are incapable of forming the requisite intent. Even where a child could form the necessary intention, according primacy to his intention would be artificial in most cases because the child's affairs would in fact be under the control of an adult so that the adult's intention rather than that of the child would be decisive in determining where he would live and for how long.

4.15 As for residence as the criterion for determining domicile, as we argued in Part II, habitual residence is sometimes an insufficiently strong connecting factor for determining the civil status and rights of adults. It is therefore difficult to see how it could be regarded as sufficient for determining the civil status of children.

> Take, for example, an orphan, E, who is domiciled in Scotland but who becomes resident abroad for four or five years for education or medical reasons or because the person with whom he lives is working abroad temporarily. It might be thought inappropriate in such circumstances that E's right to marry and any rights on his premature intestacy should be governed by other than Scots law, Scotland being his home country and the one in which he is expected to continue his life after his stay in foreign parts.

If, as we suggested in Part II, there may be circumstances in which a person may have no habitual residence or have an habitual residence in more than one country it would be necessary to introduce secondary rules or a special definition of habitual residence and thus to complicate the law.

4.16 The broader, if less objectively verifiable, test of treating the child as domiciled in the country with which he has the closest connection would avoid the difficulty of attributing an intention to a young child or of treating an older child's intentions as of prime importance. It would also avoid the artificial results of so narrow a test as habitual residence. More positively, it would allow the courts or other persons seeking to determine the child's domicile to reach the most appropriate conclusion taking into account all the circumstances of the case including, for example, the intentions of the child, if any, and of those with de jure and de facto control over him; his and his parent's nationality; where he is or was in fact resident at the time in question; his family background and his education. A further attraction of a closest connection test is that it provides a certain amount of built-in protection against a third party attempting to manipulate the child's domicile for some improper purpose. In such a case, we suspect that the courts would scrutinise with particular care any argument that the child had become most closely connected with a country to which he had been removed solely or largely for some ulterior and improper purpose. The closest connection test is not unprecedented in common law jurisdictions. Section 11 of the Australian Domicile Act 1982[82] provides that where an immigrant has entered Australia with the intention of staying permanently but has yet to acquire a domicile in one of the constituent Australian states he is deemed to be domiciled in the State "with which he has for the time being the closest connection". Though such a closest connection test might have the disadvantage of uncertainty, it would, we think, be better than any other test for the purpose of ascribing a domicile to children who do not have a home with either parent, not least because it would not involve attempting to judge between two equally appropriate or inappropriate parental domiciles.

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82 See Appendix B below.

Home as the Distinguishing Factor

4.17 If, for the purpose of domicile, children are to be divided into those who have a home with both parents or one parent and those who do not, one needs to be satisfied that having or not having a home with parents provides a workable and appropriate criterion. The concept of "having a home with" is already used in section 4 of the Domicile and Matrimonial Proceedings Act 1973[83] to cover cases where the parents of a legitimate child are living apart and the child has his home with his mother. In that situation, he receives by way of exception under the current law his mother's domicile. In that context, "home" appears to have caused no problem and we think it would cause none in the overwhelming majority of cases were its use to be extended as we propose. We should add, however, that we expect a child to be treated as having his home with his parents not only where they live together day to day, but also where there are temporary separations even on a regular basis. Examples would be where the child attended a boarding school or was hospitalised or where the parent was absent in the course of his work say as a diplomat, a member of the armed forces, a business executive in a multinational company or a construction worker. In particular, we consider that having a home with a parent would embrace the period after birth during which a child may remain in hospital. As the Private International Law Committee commented in a slightly different context, "[w]hat constitutes a home must depend on the facts of each case"[84] and we recognise that there might be rare hard cases. Most difficult, perhaps, would be the case where there was no physical place, no common address, which the parent and child could call home.

> Take, for example, C. whose businessman father and his mother are based for the moment in Baghdad in company accommodation and who have sold up their home in England though intending to return and buy a new house once the foreign tour of duty is over. Meanwhile, C is at boarding

83 See also Children Act 1975, s.9 [Adoption Act 1976, s. 13] and s.33.

84 First Report (1954) Cmd. 9068, para. 13.

school in England but stays with his parents in temporary accommodation in England when his holidays and their periods of home leave coincide. In such a case, it might seem artificial to suggest that C has a home with his parents either in Baghdad or in England, yet it is desirable that he should be treated as having his home with his parents.

In our view, the rare cases of doubt about whether a child has a home with his parent or parents should not cause major problems. Nor ultimately, in our view, should the distinction have undesirable results. In most cases where a child is held not to have his home with his parents but they remain closely linked in other ways, it is extremely unlikely that the child would be held to be domiciled in a country different from that of his parents even if his domicile were to be determined independently of them on the basis of the country of his closest connection.[85] It would have to be accepted, however, that in rare cases the proposed changes might result in a child, whose formal links with his parent have remained intact and who still retains a close relationship with him or her, ceasing to be dependent on that parent for his domicile.

Take, for example, D, whose widowed mother has to go out to work and who is unable to have D living with her: instead he lives with his grandparents. In such a case, despite the mother's continuing custody of D, and even given a close personal relationship, D's domicile would be independent of his mother.

In our view, however, contrary to first impression, the result of cases such as D's would not be objectionable. Whatever the economic or other pressures on his mother which prevent her from keeping a home for D, she would retain the right to decide, within the choices open to her, where the child should live and accordingly, in practice, have the power to determine his domicile.

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85 See paras. 4.13-4.16 above.

Conclusions

4.18 We have reached the provisional view that, subject to what we say below[86] about powers of election and children who marry under the age of 16, the domicile of a child under 16 should be determined as follows:

(a) where he has his home with both his parents his domicile should be the same as and change with the domicile of:

(i) his parents if their domiciles are the same or

(ii) his mother if the domicile of the parents are different;

(b) where he has his home with one parent only his domicile should be the same as and change with the domicile of that parent; and

(c) in any other case he should be domiciled in the country with which he is for the time being most closely connected.

We recognise that it could be argued that, given the small number of children who might benefit from a change in the rules governing their domicile and the transitory nature of childhood, the case for changing the law at all is weak. We consider, however, that what we have recommended has two advantages in addition to ensuring that in future a child who does not have a home with a parent receives a more appropriate domicile than is sometimes the case under the existing law. First, the amended law would be simpler. It would, for example, remove the need to provide special rules to govern the domicile of illegitimate children; foundlings; legitimate children whose fathers have died and children who live with their mothers following a separation of their parents. Second, by extinguishing the difference in treatment accorded to a child depending on his legitimate or illegitimate status the amendments would advance the general cause of non-discrimination. More important

86 Paras. 4.23 - 4.29.

perhaps, as we mentioned in paragraph 4.6, the law would recognise the justifiable interest of the illegitimate child and its father in being treated no differently from a legitimate child and his father where they live as a family. Thus, for example, the illegitimate child would in future receive his domicile from both parents where they were all living together and the parents' domiciles are the same. Further, if the mother of an illegitimate child died or abandoned him, or if she separated from the father, the child who took up or continued to have his home with his father would receive his domicile rather than continuing to be dependent on that of his mother.

4.19 In closing, it is, perhaps, worth noting that according an independent domicile to some children is not a novel idea in common law jurisdictions. For example, the draft Canadian Code[87] provides quite broadly that children should have an independent domicile. In addition, in some jurisdictions in the United States of America an abandoned child may acquire an independent domicile.[88]

DOMICILE AT BIRTH

4.20 Unless the rules elaborated in paragraph 4.18 above for determining the domicile of a child are insufficient or in some way inappropriate for determining the domicile of a child at the moment of birth, it would be difficult to justify continuing to complicate the law by retaining for that purpose alone the special rules for determining the so-called domicile of origin. The rules set out in paragraph 4.18 are, in our view, adequate to provide a child with an appropriate domicile at birth. We recognise that it might be questioned whether the term "home" could cover the case of a child born and remaining in hospital for some time afterwards. We consider, however, as indicated already in paragraph 4.17, that the courts would have no difficulty in finding that such a child

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87 See n. 25 above.

88 The American Restatement, comment f, on emancipated minors and Leflar, as cited in n.80 above.

had his home with his parents where in the normal course of events he will go to live with them when his medical condition allows him to leave hospital. In any event, we doubt that the concept of home would cause any more artificiality than that arising in the present law from having separate sets of rules for determining a child's domicile of origin at birth and his childhood domicile thereafter. An example of present artificiality is the legitimate child who is born after his parents have separated and who has his home with his mother from the start. In theory, at least, it can be argued that such a child receives a domicile of origin derived from his father at birth, but that it is immediately replaced by a domicile of dependency derived from his mother under section 4 of the Domicile and Matrimonial Proceedings Act 1973.[89] If that is right, then, apart from the immediate artificiality, if in adult life the child were to lose one domicile of choice without acquiring another, his domicile of origin, derived from a father with whom he had never lived or, perhaps, even seen, would revive rather than the domicile which the child had had from the first instant of life and throughout his childhood.

4.21 It might be said of the proposed rules in paragraph 4.18 that a new or recently born child who has no home with a parent may well have few substantial connections, if any, with a particular country and that employing the concept of the country of closest connection in such circumstances would involve artificiality. However, the current rules governing the domicile of origin which attribute a parent's domicile to a child with whom he may have no more than a formal relationship, or which treat all foundlings as domiciled in the country where they are found irrespective of other circumstances, are no less artificial, and in some ways far more artificial, in their results than the proposed new criterion of closest connection would be in respect of newly born children.

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89 Dicey & Morris, p.109 and Cheshire and North, Private International Law 10th ed., (1979) pp.178-9. Cf. Bromley, Family Law 6th ed. (1981) p.12 for the view that such a child would take his domicile at birth from his mother.

4.22 In our view the law and those affected by it would benefit if the separate rules to determine a child's domicile of origin at birth were abolished and in future a child's domicile was determined from the outset by the criteria set out in paragraph 4.18. The effect would be that the domicile of origin as a separate type of domicile would disappear from United Kingdom law. However, to set that conclusion in its full context, it is worth noting that the question would remain whether, when determining the domicile of an adult, the domicile which in future he would have received at birth would, like the domicile of origin:

(a) have a special tenacity which would make shaking it off a peculiarly difficult task; and

(b) revive to fill the vacuum where one domicile has been abandoned without another being acquired.

Though these two technical rules raise separate issues from the retention of the domicile of origin in itself, it may be helpful at this stage to point forward to Part V, where they are dealt with, and say that we also recommend their abolition. The overall result is that not only would the domicile of origin be redundant under our proposals, but the peculiar tenacity accorded to the domicile received at birth and the revival of that domicile, which are currently seen as closely associated with the domicile of origin, would not survive.

POWERS OF ELECTION

4.23 There is authority for the proposition that, where a child's domicile is dependent on that of its mother, a change in her domicile will result in a change in the child's domicile only if the mother so elects.[90] It also appears that in reaching her decision the mother must have regard to the best interests of the child. The Private International Law Committee favoured extending this power of election and recommended that:

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90 See Blaikie, "The Domicile of Dependent Children: A Necessary Unity?" 1984 Jur. Rev. 1.

(a) where the domicile of the appropriate parent changes "the domicile of the infant shall not thereby be changed unless that person so intends", thus allowing the father as well [as the mother] in an appropriate case, to make the election; and

(b) "a court of competent jurisdiction shall have power to make such provision for the purpose of varying an infant's domicile as it may deem appropriate to the welfare of the infant."[91]

There is only one United Kingdom authority directly on the point, Re Beaumont,[92] itself now over 90 years old.[93] The question facing the court in that case was whether a child's domicile should change with its mother's when the mother received a new domicile of dependency on her remarriage. Since 1973 and the abolition of the married woman's domicile of dependency, such a case could not arise again and it is at least open to question how far Re Beaumont itself any longer represents the law.

4.24 We consider that a rule that a child's domicile should change with that of his parent only if the parent so intends would be wrong in principle and would add significantly to the law's potential for uncertainty. It would be wrong in principle because domicile is a conclusion of law drawn from the facts of a case irrespective of a person's direct intentions as to domicile. It is not something which a person can choose directly for himself, though he may, of course, re-arrange the

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91 First Report (1954) Cmd. 9068, Appendix A, Article 4 (2) & (3), and see paras. 19 & 20.

92 [1893] 3 Ch. 490.

93 There is a New Zealand case (which pre-dates the current New Zealand Domicile Act 1976), Re G. [1966] N.Z.L.R. 1028, in which Wilson J. advanced the general proposition that "a dependent person's domicile changes when his parent intends it to change and the change is for his benefit, irrespective of whether the domicile of the parent also changes."

circumstances of his life to effect this conclusion of law. Accordingly it would seem wrong that it should be capable of being chosen directly by someone else. Furthermore the rule would be productive of uncertainty because it would involve an investigation of the subjective state of mind of the parent in respect not only of where he intends to make his home, but also of whether he intends to change the domicile of his dependent child. That uncertainty is added to if Re Beaumont is correct in holding that the parent's decision is governed by what is in the child's best interest, for in those circumstances, even if the parent's intention as regards the child's domicile could be clearly ascertained, it could subsequently be challenged as not having been in the child's best interest and accordingly ineffective.

4.25 However, what in our view is the gravest criticism of the Re Beaumont approach and that of the Private International Law Committee is that if applied they would in practice freeze nearly all children's domiciles at birth. We say this because it seems almost beyond question that there can be only a tiny number of cases, if any, in which the parent consciously takes a decision in respect of his or her child's domicile, even assuming, which can rarely be the case, they would know what domicile was if it were drawn to their attention.

4.26 We turn next to the Private International Law Committee's recommendation that the courts should have a general power to make orders in respect of the domicile of a child. It is not clear to us that, even if it were desirable in principle for the court to have such a power,[94] it would be proper to exercise the power solely on the basis of the child's welfare. Often persons other than the child have an interest in his domicile which may not be the same as, and may even be contrary to, that of the child, but which it would be unjust to ignore.

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94 In principle the case for giving the court such a power is open to the same objections as those to allowing a parent to chose a child's domicile; see para. 4.24 above.

4.27 We have concluded that to enable a parent or a court to override the operation of the general rules governing the domicile of a child would give wide scope for artificiality in the law, allowing either of them to exercise their power so that a child remained domiciled in a country with which his links had been severed and despite the child being otherwise domiciled in a new country under the general rules. The artificiality would be even starker in future in respect of children who do not have a home with their parents and whose domicile under the general rules would be in the country with which they were, as a finding of fact, most closely connected.

4.28 It is also important to note that, even in the absence of a direct power to override the general rules, parents and the courts would continue to have wide powers available to them to determine indirectly, in certain cases, where a child is to be domiciled. So far as the parent is concerned, he can and would continue to be able to control the domicile of the child who has a home with him simply by controlling his own domicile. Even where the child did not have his home with him, and would under our proposals be domiciled in the country of his closest connection, the parent could often exercise his parental rights to control the affairs of the child, including where he lived, and thus indirectly decide where the child should be domiciled. As regards the courts, they already have power in various proceedings (including custody and matrimonial and, in England and Wales and Northern Ireland, wardship, guardianship and care proceedings) to decide with whom and where a child should live. Hence where a child is the subject of such proceedings, the courts already have and would continue to have power to control where the child was domiciled. Finally, as we pointed out in paragraph 4.14, our recommendation in respect of a child who does not have a home with his parents contains built-in protection against an improper manipulation of such a child's domicile which significantly weakens the argument for having other protective provisions.

4.29 It is our view that so called "protective" provisions in the law of domicile to allow a parent or court to override the general rules governing the domicile of children are unnecessary and inappropriate and would result in increased and unjustified uncertainty and artificiality in the law without any significant improvement, and indeed perhaps with some deterioration, in the position of children.

AGE LIMITS

4.30 In the law of Scotland the age at which a child can acquire an independent domicile is not 16, as it is in the rest of the United Kingdom, but is 12 for girls and 14 for boys.[95] These are the ages, derived from Roman law, at which children cease to be pupils and become minors in Scots law. The Scottish Law Commission is preparing a consultative memorandum on the legal capacity of pupils and minors in which one of the options considered will be the replacement of the ages of 12 and 14 by the age of 16 for the purposes of legal capacity in private law matters generally. Regardless of the results of consultation on these wider issues the Scottish Law Commission considers that 16 is a more appropriate age than 12 or 14 as the age at which an independent domicile can be acquired. Below the age of 16 children in the United Kingdom are generally still at school and dependent on adults. Above that age they may have left school, taken employment, married and moved to another jurisdiction. Not only is 16, in the conditions of the present time, a manifestly more suitable age in itself for this purpose but there would also be advantages in having the same age throughout the United Kingdom. If, for example, a family consisting of father, mother, son of 15 and daughter of 13 moved from Scotland to England it would be unfortunate if the children were held by an English court to be domiciled in England and by a Scottish court to be domiciled in Scotland. Our provisional recommendation is therefore that in Scotland, as is already the case in other parts of the United Kingdom, 16 should be the age at which an independent domicile can be acquired.

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95 Anton, pp. 171-172.

MARRIAGE UNDER THE AGE OF SIXTEEN

4.31 Under the present law in England and Wales and Northern Ireland, special provision is made for the domicile of a person marrying under the age of 16. Section 3(1) of the Domicile and Matrimonial Proceedings Act 1973 provides that:

> "The time at which a person first becomes capable of having an independent domicile shall be when he attains the age of 16 or marries under that age..."

This provision does not apply to Scotland where, not suprisingly in view of the low ages at which an independent domicile can be acquired, there is no authority on the effect on domicile of a marriage under those ages.

4.32 Cases involving the domicile of persons who married under the age of 16, and whose domicile has to be determined with reference to a time when they where still under 16, will be extremely rare in practice. They could arise only if it was necessary to establish the domicile of a person who married under that age in a country outside the United Kingdom at a time when he or she was domiciled in a country which permitted marriage below that age.[96] In addition, the rules we propose for determining the domicile of a child under 16 would provide a domicile independent of the parent unless the child was living with him.[97] Having thus broken the absolute dependence of the child's domicile, it seems unnecessary to have a separate rule according an independent domicile to a child under 16 merely because he has married. To illustrate the point, the position of a girl marrying under the age of 16, for example, would be as follows:

(a) If she had her home with both parents she would take their domicile (or the domicile of her mother if her parents' had different domiciles). This would not seem inappropriate.

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96 See n. 53 above.

97 See para. 4.18 above.

Even if her husband's domicile were different (for example, because they were not yet cohabiting) it could not now be maintained that there was any reason why the domicile of a husband and wife should necessarily be the same.

(b) If she had her home with one parent she would take that parent's domicile. Again, this would not seem inappropriate. The policy considerations would be the same as in the last case.

(c) If she did not have her home with either parent (for example, if she were living with her husband in a separate home) she would be domiciled in the country with which she was for the time being most closely connected. Again, this would not seem to be an inappropriate solution. In practice, in most cases, she would probably be held to be domiciled in the country where she lived with her husband.

Given that questions as to the domicile, while under 16, of persons married under that age, are likely to arise infrequently, if at all, in the United Kingdom and that the results of applying our proposed general rules would not be inappropriate, our provisional conclusion is that it is unnecessary to make any special provision for this situation.

DOUBLE DEPENDENCY

4.33 As the law currently stands, the domicile of the illegitimate child of a dependent mother is the same as and changes with the domicile of the appropriate grandparent because the child's domicile is dependent on that of his mother and the mother's domicile in turn is dependent on that of her appropriate parent. It may be suggested[98] that the artificiality of such a double dependency when coupled with the alleged

98 Palmer, "The Domicile of an Infant - Some Comments Upon The 1973 Act" (1974) 4 Fam. Law 35, 38.

inappropriateness of a parent being dependent on another for her domicile, calls for a reform in the law which would accord an independent domicile to all mothers irrespective of their age. We are not convinced by those arguments. If an under-aged mother remains with the child in her parent's home, it would normally be perfectly appropriate for them all to have the same domicile. And if she does not continue to have a home with her parents, then under our proposals she would be accorded a domicile independent of her parents and the case for an exceptional rule would fall. The same considerations would apply to any suggestion that fathers under the age of 16 should automatically be accorded an independent domicile.

PART V

DOMICILE OF ADULTS

INTRODUCTION

5.1 As we explained earlier[99], on reaching the age of 16[100] (or marrying thereunder) a person continues to be domiciled in the country in which he was domiciled immediately before attaining that age unless and until he abandons that domicile and either:

(a) acquires a domicile in a new country or

(b) his domicile of origin revives.

The rules governing the acquisition and revival of domicile have been attacked for the artificiality and the uncertainty which they can create in some circumstances, and various reforms have been proposed, most prominently in the United Kingdom by the Private International Law Committee.[101] While examining those matters, however, it should be borne in mind that we have already made recommendations which would have the effect of abolishing the domicile of origin as a separate type of domicile. However, as we pointed out in paragraph 4.22, the question still remains whether the domicile received at birth, however determined, should be more tenacious than any other and whether it should revive to fill a vacuum when one domicile of choice is abandoned without another being acquired. These are some of the questions with which we deal below.

RULES OF ACQUISITION

Introduction

5.2 As outlined in Part III, a person may only acquire a new domicile by a combination and coincidence of:

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99 Para. 3.5 above and n. 53.

100 In Scotland 12, in the case of a girl and 14, if a boy. See also paras. 4.31-4.32

101 First Report (1954) Cmd. 9068.

(a) residence in a country; and

(b) an intention to make his home there permanently or indefinitely.

The current rules have been criticised in two major respects, namely that they lead to:

(a) artificiality, because of the tenacity of an established domicile which often continues long after any substantial connection with the country concerned has ceased; and

(b) uncertainty, because of the difficulty of ascertaining the intention of the person concerned and hence in determining where he is domiciled.

Tenacity of an Established Domicile

5.3 The tenacity of an established domicile, and particularly one of origin, is nowhere better illustrated than in the case of Ramsay v Liverpool Royal Infirmary,[102] in which a man who had moved from Glasgow to Liverpool in 1892, where he lived until 1927, was held to have retained his domicile in Scotland, despite having never returned to that country and having arranged to be buried in Liverpool. The tenacity appears to derive from four sources, namely:

(a) the incidence of the burden of proof;

(b) the standard of proof where the established domicile is one of origin;

(c) the nature and content of the intention required to acquire a new domicile; and

(d) the inherent difficulty in proving a subjective state of mind.

Burden of Proof

5.4 As we have noted above the burden of proving the acquisition of a new domicile falls on the person alleging it. That rule in itself plainly favours the retention of an established domicile.

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102 [1930] A.C. 588.

Standard of Proof

5.5 The extra power of adhesion of the domicile received at birth, currently the domicile of origin, derives in part, in England and Wales, from the unusually high standard of proof required of a person seeking to show that such a domicile has been displaced by the acquisition of a domicile of choice.[103] The necessary intention in such a case must be shown with "perfect clearness and satisfaction"[104] to the court or "beyond a mere balance of probabilities",[105] a standard of proof unarguably higher than that usually employed in civil disputes including cases where what is alleged is a change from one domicile of choice to another such domicile.[106]

Content and Nature of the Intention

5.6 Some of the older authorities have tended to interpret the requirement of an intention to make a home "permanently" in a country as meaning "perpetually", so that even a vague hope of returning to a country of an erstwhile domicile has precluded a person from being treated as having acquired a new domicile of choice in the new country of residence. As regards a case involving an alleged change of domicile from one received at birth, currently the domicile of origin, to one of choice, it has been held that the quality of the intention must amount to "a fixed and settled purpose" - "a determination" - "a final and deliberate intention"[107] to abandon the country of the domicile of origin and settle

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103 In Scotland it is not clear that any standard other than the normal standard of proof on a balance of probabilities applies: see para. 3.8 and n. 66.

104 Winans v Attorney General [1904] A.C. 287, 292 per Lord Macnaughten.

105 Henderson v Henderson [1967] P.77, 80 per Sir Jocelyn Simon P.

106 Re Flynn [1968] 1 W.L.R. 103.

107 Winans v Attorney General [1904] A.C. 287, 291-2 and see n. 58 above.

permanently in the new country of residence and that any hint of equivocation in the mind of the person concerned is enough to prevent the acquisition of a domicile of choice. It may be that more recent authorities have liberalised the position: for example, Scarman J., as he then was, in In the Estate of Fuld (No. 3) observed that -

> "...if a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, e.g. the end of his job, the intention required by law [to acquire a new domicile] is lacking; but if he had in mind only a vague possibility such as making a fortune (a modern example might be winning a football pool), ... such a state of mind is consistent with the intention required by law."[108]

Difficulty of Establishing Intent

5.7 Finally, the Private International Law Committee expressed a general concern when it said:

> "that it may be extremely difficult to ascertain a person's true intention about his permanent residence, where this involves, as it often does, an investigation of the state of mind of a deceased person. "The tastes, habits, conduct, actions, ambitions, health, hopes and projects of [the person concerned], were all considered as keys to his intention..." (per Lord Atkinson in Casdagli v Casdagli [1919] A.C. 145 at p. 178). The court has no presumption of law to guide it in weighing evidence of a man's subjective intentions, but "there is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change his domicile" (per Kindersley V.C. in Drevon v Drevon [1864] 34 L.J. (N.S.) 129 at p. 133)."[109]

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108 [1968] P. 675, 685.

109 First Report (1954) Cmd. 9068, para. 9.

Uncertainty

5.8 As regards the uncertainty caused by the existing rules governing acquisition and its consequences in practice, we can do no better than complete the quotation from the First Report of the Private International Law Committee begun in the previous paragraph:

> "The undesirable results of this [the difficulty of ascertaining the required intention] are obvious. Trials are apt to be long and expensive; for since a man's state of mind must be investigated, evidence even of the smallest matter is relevant. Besides, the difficulty of reaching certainty in matters of domicile in the absence of any decision by a competent court is a serious inconvenience to numerous people when they come to make a will or in the many other circumstances in which it is necessary to know which legal system is applicable. The practitioner may find it impossible to advise his client with confidence, since he cannot prophesy what impact the facts will have upon the judge's mind."[110]

Proposals For Reform

Reducing the Tenacity of the Domicile Received at Birth

5.9 It could be argued that the minimum reform required to reduce the tenacity of an established domicile and the consequent risk of artificiality would be to abolish any special rules entrenching the domicile received at birth, currently the domicile of origin, experience and the case law having shown that disputes involving that type of domicile have caused most of the adverse criticism. The rationale of its peculiar tenacity seems to be the identification of the country of that domicile with the patria or homeland of the person concerned and the allegedly reasonable expectation of expatriates that, despite prolonged periods abroad, their private and family life will continue to be governed by the

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110 Ibid.

law of their homeland. It could be argued that the pre-Second World War attitudes displayed in cases such as Winans v Attorney General[111] and Ramsay[112] are anachronistic today, being a direct response to the demands of a now vanished Empire and the desire of imperial and colonial servants and the businessmen who accompanied them to retain their domiciles in the United Kingdom. However, the void left by the imperial administrator and soldier has been filled by the ever-expanding population in the international business community, and, in our view, whatever may be the other objections to the tenacity of the domicile received at birth, anachronism is not one. Nonetheless, as foreshadowed in Part IV, we do not believe that loosening the grasp of the domicile which a person receives at birth merely by aligning the standard of proof with the usual civil standard would seriously threaten the position of expatriates, nor do we think that requiring a special quality of intention is necessary to protect their position.

5.10 It could also be argued that in general it is unrealistic to require an intention to make a home permanently or, in effect, perpetually, in a country before recognising a change in a person's domicile. To do so might well mean that "no man would ever have a domicile at all, except his domicile of origin"[113] and would enhance the risk of artificial decisions, such as that in the Ramsay case, continuing to be reached. In our provisional view it should be made clear for the future that an intention to make a home indefinitely in a country should suffice to acquire a new domicile. This would confirm the approach

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111 [1904] A.C. 287.

112 Ramsay v Liverpool Royal Infirmary [1930] A.C. 588.

113 Attorney General v Pottinger (1861) 30 L.J. Ex. 284, 292 per Lord Bramwell.

adopted In the Estate of Fuld (No. 3).[114] Hence, if a man makes his home in a country and has no present intention to return in the future to the country of his erstwhile domicile or to move on to make a home in another country, he should be regarded as being domiciled in the country of his residence.

Presumption of Change

5.11 Such minor reforms would not, however, in any direct way affect the uncertainty to which the present rules give rise or the tenacity of an established domicile in so far as they are caused by the inherent difficulty of divining a person's intentions. Indeed, the Private International Law Committee ignored any intermediate reforms such as those we have discussed in paragraphs 5.8 and 5.9 above and pinned its hopes for improvement on a rebuttable presumption as to intention based on where the person has his home at the time in question.[115] As we have noted, this proposal attracted objections from the foreign community in the United Kingdom, some members of which feared the tax implications of the presumption which appeared to make it much more difficult to assert a continuing domicile in their home country and hence their rights to exemption from United Kingdom tax.[116] We think it important to recognise, however, that in the great majority of cases the facts will point clearly to where a person is domiciled and a presumption will be of no practical significance. In the minority of cases where doubt arises, a presumption is unlikely to be challenged in any save a tiny handful of cases provided the facts which give rise to it are ones which, when present, usually point correctly to the acquisition of a new domicile. Thus it is to the formulation of appropriate criteria for raising the presumption that we turn next.

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114 [1968] P. 675 and see para. 5.5 above.

115 First Report (1954) Cmd. 9068 para. 15 and Appendix A, Article 2.

116 See paras. 1.4 and 1.7 above.

5.12 The Private International Law Committee proposed, in effect, that:

(a) subject to evidence to the contrary, a person should be presumed to intend to live permanently in the country in which he has his home;

(b) where he has more than one home he should be presumed to intend to live permanently in the country where he has his principal home;

(c) where a person is in a country to carry on a business, profession or occupation, and any wife and children have their home in another country, he should be presumed to intend to live permanently in that other country; and

(d) no presumption should be raised in respect of diplomats, members of the armed and civil services of any country or persons working for an international organisation.[117]

Though we have sympathy in principle with the introduction of a presumption, in our view the detailed proposals of the Committee are open to criticism in a number of ways. First, the extent of the presumption's utility is dependent on how much easier it is to establish the facts giving rise to it than it is to prove the required intention itself. We consider that employing the concept of "home" in raising a presumption would give rise to disputes about where a person's home was which would often be no easier to resolve than a full investigation of where the person was domiciled. Indeed, the Committee in saying that "what constitutes a home ... is in the last resort determined by the intention of the party, so that a type of residence which might constitute a home in one case would not necessarily do so in another"[118] came close to recognising that fact.

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117 First Report (1954) Cmd. 9068, para. 15 and Appendix A, Article 2.

118 Ibid., para. 13.

5.13 In our view, the concept of habitual residence is more susceptible to objective verification than that of a home would be, though like the Committee we are aware that it is capable of some ambiguity. Residence is itself already a well understood and essential element of the law of domicile and, as we noted earlier,[119] the concept of habitual residence is already widely used as a connecting factor in international conventions and in United Kingdom and Commonwealth legislation. Thus using habitual residence as the basis for the raising of a presumption of intention would build upon already well established foundations in private international law.

5.14 We do not think that proof of habitual residence alone would be sufficient evidence of domicile to justify raising a presumption as to intention. However, we consider that there must come a time when a person has been habitually resident in a country for such a period that the likelihood of his intending to stay there indefinitely must be high. Thus, in our view, a rebuttable presumption of an intention to make a home indefinitely in a country based, say, on seven years' habitual residence as an adult, would largely exclude the possibility of it being raised in respect of members of the foreign business community who are required to serve a tour of duty in the United Kingdom or, indeed, in respect of British businessmen or others working temporarily abroad. Clearly, the longer the qualifying period, the less likely is it that the rebuttable presumption would be raised in cases where a thorough investigation would show that no change of domicile had occurred. However, the longer the period, the fewer would be the cases in which the presumption would operate, and, though we accept that there is no magic in seven years, it seems to us to strike about the right balance between the interests of the expatriate in not being put unnecessarily to proof in order to rebut the presumption and retain his domicile, and that of courts, legal advisers and administrative officials in not being put to lengthy investigations of a person's subjective state of mind in cases where the objective facts point to a change of domicile.

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119 Para. 1.12 above.

5.15 We are not convinced of the need for any tie-breaking rule to deal with cases where it might be alleged that a person is habitually resident in two countries. Indeed it can be argued that, given the interpretation put on habitual residence by the Council of Europe,[120] a person may have only one country of habitual residence under the existing law. However that may be, it seems to us that if it were ever alleged that a person was habitually resident in more than one country, an investigation to decide which was the principal country of his habitual residence is likely to raise the same issues as, and be no less complex and probing than, a full investigation of the person's intention. Accordingly, we see no useful purpose in any tie-breaking rule. We also consider the Private International Law Committee's proposal to deal specifically with the case of a person who, in the course of his business, has acquired a separate country of habitual residence from the rest of his family, to be over refined. As regards a special exemption for servants of the state and international organisations, we consider it would be invidious and unjustifiable to treat them differently from other people who have to serve abroad in the course of their work. In any event, like the employees of multinational corporations on tours of duty abroad, we doubt whether the tour of duty of most state servants would exceed seven continuous years in any one country: and even where it did, the presumption could be rebutted as it would usually be beyond dispute that there was no intention to reside there once the tour of duty or job was over.

5.16 If a presumption based on a period of habitual residence were introduced, time should not in our view begin to run until the person is capable in law of acquiring an independent domicile of choice, i.e. on reaching the age of 16.[121]

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120 Standardisation of the Legal Concepts of "Domicile" and of "Residence", Resolution (72) 1 and Annex adopted by the Committee of Ministers of the Council of Europe on 18 January 1972, Explanatory Memorandum, Chapter III.

121 See paras. 4.30-4.32 above.

Conclusions

5.17 Our provisional recommendations are that:

(a) the normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile;

(b) no higher or different quality of intention should be required when the alleged change of domicile is from one received at birth than from any other domicile;

(c) to establish a domicile it should be sufficient to show an intention to make a home in a country indefinitely; and

(d) subject to evidence to the contrary, a person should be presumed to intend to make his home indefinitely in a country in which he has been habitually resident for a continuous period of seven years since reaching the age of 16.[122]

DOCTRINE OF REVIVAL

Introduction

5.18 As we have already explained in Part III, if a person abandons a domicile of choice without acquiring another such domicile, the domicile he received at birth, currently his domicile of origin, revives to fill the gap. As with the entrenchment of that domicile, the rationale underlying the doctrine of revival would appear to be the identification of the country of the domicile at birth with the patria or homeland of the person concerned in which, in the absence of any substantial connection with another country, it is arguably most appropriate that he should be treated as domiciled. Despite the persuasiveness of that rationale, the doctrine has a potential for artificiality in cases where the connection with the country of the domicile at birth was never substantial or where it has been greatly weakened. Two examples may suffice to illustrate the point.

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122 Ibid.

(1) A is born in India to English domiciled parents, and thus receives at birth a domicile in England. He remains in India after reaching the age of 16 and acquires a domicile of choice there. Later, in middle life, he leaves India intending to settle in the U.S.A. At that point, A's domicile of choice in India ceases and his English domicile revives, although he has never even visited, let alone lived in, England. If A dies intestate before acquiring a domicile in one of the States of the Union, the succession to his moveable estate would be governed by English law.

As regards cases where the connection has weakened substantially -

(2) B is born to parents resident and domiciled in New South Wales. He leaves that country on reaching the age of 16 with the intention of never returning and lives for the next 40 years in England where he marries and raises a family. When his wife has died and his children have grown-up, he leaves them in England, intending never to return as a permanent resident, and shortly thereafter, but before he can establish a new domicile of choice, dies. In those circumstances, B dies domiciled in New South Wales whose law will, for example, regulate his children's rights of succession on intestacy to his moveable property.

Continuance Rule

5.19 Presumably, it was the potential for artificiality which led the Private International Law Committee in their First Report to describe the doctrine of revival as "undesirable" and to propose that it be replaced by a rule to the effect that an existing domicile "shall continue until another domicile is acquired".[123] The Committee did not, however, in their

123 (1954) Cmd. 9068, para. 14.

Report argue the merits of the case or advert to the unavoidable artificiality in any rule which seeks to revive or prolong a connection between a person and a country which he has abandoned. It is worth noting that, as the American experience has shown,[124] what we shall call the continuance rule is itself capable of producing artificial results in some circumstances and cases can be instanced where the revival rule would produce a more appropriate result.

> Take, for example, C born to parents resident and domiciled in Scotland where he also remains until he is an adult. Thereafter he moves to Ruritania where he sets up business and decides to make his permanent home. A revolution and change of government followed by political unrest and a threat of persecution drive him out and he moves to the U.S.A. where he has business interests. However, by this time, C has resolved never to return to Ruritania, but to retire to Scotland when he stops work. He then dies. According to the continuance rule his domicile on death would be Ruritania, the one country in the world in which he has positively resolved never again to live, whereas the revival rule would have given him a domicile in Scotland.

5.20 In these circumstances, it may be asked what advantage there would be in switching from the doctrine of revival to a rule of continuance. It can be argued that a person is more likely to remain connected to the country of his most recent domicile than to his country of birth and that persons without a permanent home are usually more closely associated with the country in which they last had such a home, than with that in which they were born. In addition, it might be said that in general it is easier to establish the last acquired domicile than it is

124 For example, Re Jones' Estate, 192 Iowa 78, 182 N.W. 227 (1921).

to establish where a person was domiciled at birth. Whilst none of those arguments can be shown unequivocally to be correct there are five matters which appear to weigh strongly in favour of the continuance rule, namely:

(a) by providing that a domicile could never be abandoned but could only be displaced by the acquisition of a new domicile, a continuance rule would simplify the law by obviating the need to provide rules for abandonment;

(b) a rule of continuance has been widely recommended in law reform proposals and accepted in legislation in some common law and other jurisdictions[125] and for the sake of international uniformity there is an argument for the United Kingdom to follow that trend;

(c) adopting a continuance rule would ensure that a person was at least domiciled in a country in which he had at one time lived, whereas revival can, as we have seen, result in a person having a domicile in a country in which he has never lived;

(d) the idea of a domicile continuing until another is replaced is a simpler concept than is the doctrine of revival and should, for example, make it easier for those seeking legal advice or dealing with administrative officials to understand the law involved; and

(e) replacing the doctrine of revival with a continuance rule would remove the cases of acute artificiality which result from temporary revivals of the domicile received at birth when a person is between domiciles of choice.

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125 See for example the Australian & New Zealand legislation in Appendix B.

Secondary Connecting Factors

5.21 As both revival and continuance rules are based on fictions, it might be argued that there is a case for restricting the area of their operation to those cases in which a person has no demonstrable connection with any country, rather than resorting to them in every case where a person has no present home in which he intends to live permanently or indefinitely. This might be achieved by the introduction of secondary connecting factors which would come into play if the elements necessary to establish a domicile proper were in fact absent. An obvious candidate is habitual residence: another is country of closest connection. It would be arguably less artificial if the civil status of a person who has no country in which he presently intends to make his home indefinitely were governed by the law of, say, the country with which he is most closely connected, rather than by the law of a country which he has abandoned. However, a major objection to any secondary connecting factor is that it would add significant complexity to the law, yet the number of cases in which it would come into play would be very small. And smaller still would be the number where applying it would result in a different and better answer than a simple rule of continuance or even revival. As regards closest connection in particular, as a secondary connecting factor, any extra flexibility or rare instance of a more appropriate outcome is likely to be outweighed by the uncertainty in which applying such a criterion would result. In addition, a secondary connecting factor carries with it the idea that one domicile may be abandoned without another being acquired. It therefore follows that not only would the law be complicated by the introduction of a secondary connecting factor, but a simplification, namely abolition of the rules governing the abandonment of a domicile, would not be possible. Thus one of the advantages of replacing revival with continuance would be lost.

Conclusions

5.22 The advantages of a rule of continuance listed above have persuaded us to recommend provisionally that the doctrine of revival be replaced by a rule of continuance. As regards the secondary connecting

factor, we are of the provisional view that the complexity which it would cause in the law, including the need to retain rules governing the abandonment of a domicile, would not be justified by the few cases in which, on rare occasions, it might result in a marginally more appropriate system of law governing the civil status of the individual concerned.

PART VI

DOMICILE OF AN INCAPAX

INTRODUCTION

6.1 The effect of the current rules governing the domicile of adults[126] who lack the capacity to acquire a domicile of choice[127] appears to be that [128]

(a) an incapax cannot acquire a domicile of choice and, subject to (b) below, retains, while his incapacity lasts, the domicile he had at the onset of his incapacity or (in Scotland) on the attainment of the age when his domicile of dependency ceases, whichever is the later, but

(b) in England and Wales and Northern Ireland, where the onset of the incapacity pre-dates the person's sixteenth birthday, his domicile of dependency continues thereafter unless and until he recovers his capacity.

CRITICISMS OF THE EXISTING LAW

6.2 The first limb of the rule governing the domicile of an incapax is open to the criticism that, by freezing his domicile irrespective of changes in his circumstances, the law is likely to create artificiality and unfairness.

> Take, for example, A, a young man born and domiciled in England who goes to live in Canada after he reaches the age of 16 and acquires a domicile in British Columbia. Soon after acquiring that domicile of choice he becomes mentally incapacitated and his parents secure his return to England

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126 See para. 3.5 above.

127 See para. 3.6 above.

128 See paras. 3.10 and 3.11 above.

where he lives with them. Under the present rules, A would nonetheless remain domiciled in British Columbia until he died unless he regained his capacity at some future time.

As to the second limb, it is arguably inappropriate that the domicile of an incapax should remain dependent on his parents long after any legal duty on the parent's part to care for him may have ceased and when in fact he may have ceased to live as part of the family.

6.3 We also recognise how uneasily the current rules governing the domicile of an adult incapax would sit with our proposals in respect of the domicile of children who do not have a home with a parent or parents. Under those proposals, such children, whether orphaned, abandoned or merely living separately from their parents under an official or unofficial arrangement, would in future be domiciled in the country with which they have for the time being the closest connection. Were that proposal implemented and the current law governing the domicile of an incapax to survive, it would have the odd effect that the domicile of a child incapax who does not have a home with his parents would change if his connections changed, but on reaching the age of 16 his domicile would either become frozen or perhaps in England and Wales become dependent on his parents under the second limb of the existing rule. The results in practice might be difficult to justify.

Take, for example, B, a mentally handicapped child living in a residential home in Scotland and domiciled in that country. When his parents move south to settle in England, B, aged 10, is transferred to a home in England so as to be close enough to his parents to be visited by them. He becomes domiciled in England, that country being the one with which he is now most closely connected. However, when B's parents die twenty years later, and B, now aged 30, returns to Scotland to live with his surviving relations, he would remain domiciled in England.

PROPOSALS FOR REFORM

6.4 There are significant parallels between the situation of a child who does not have a home with his parents and that of an adult incapax. Both lack the capacity to acquire an independent domicile under the rules governing the domicile of persons of full age and capacity: both however, may well not have such a close relationship with their parents, even if they are alive and can be found, as would make it appropriate that their domicile should depend on that of their parents. However, in both cases freezing the domicile irrespective of changes in the person's circumstances is likely to lead to artificiality. We have therefore concluded that there is a case for extending by analogy our proposals for the child who does not have a home with a parent or parents to the adult incapax and according an incapax a domicile in the country of his closest connection. Were that conclusion given effect, an incapax on reaching the age of 16 would lose his domicile of dependency and acquire a domicile in the country with which he was for the time being most closely connected.

6.5 The only possible exception to that proposed rule which has suggested itself to us is that, on a strict analogy with the rules applicable to children, an incapax who has a home with a parent or parents might receive a dependent domicile. That suggestion is, however, open to the objection that only in very rare cases would dependency produce a different domicile from a test of closest connection and even then the results might often be less appropriate.

> Take, for example, C, born in England to parents domiciled in India and who intend to retire there. C is brought up and educated in England, qualifying and setting up in practice as an accountant, it being his and his parents' expectation that he should remain in England after his parents retire to India: consequently, C acquires an English domicile. Later, C suffers severe brain damage in a car accident and returns to have a home with his parents. It is, however, still not their intention

to take him with them to India: rather he will go to live with other relatives in England when his parents leave. Nonetheless, he would receive an Indian domicile on his incapacity and presumably would lose it again when his parents retired to India and he ceased to have a home with them.

It might also be objected that, if the domicile of an adult incapax who has his home with his parents were to be dependent on the parental domicile, then the domicile of an incapax who has a home with a spouse or other relative should be dependent on that of such persons. In all these circumstances, we are not persuaded that an exception to our proposed rule of closest connection is either necessary or desirable.

PROTECTIVE PROVISIONS

6.6 Not only would our proposal in respect of the adult incapax lessen the risk of the law imposing on him an inappropriate domicile, but, as we have already mentioned in relation to children, the concept of "country of closest connection" seems to us to provide a certain amount of built-in protection against the admittedly unlikely risk of a third party seeking to manipulate the domicile of an incapax, for example, to attract rules of succession which would be more beneficial to him on the death of the incapax. We suspect that the courts in many such cases would have little trouble in finding that a change of residence brought about solely for such an ulterior purpose did not sever the connection between the incapax and the country of his erstwhile domicile or create a closer connection with the country to which he had been moved.

6.7 It may be suggested that the domicile of an incapax should only be changed with the consent of a competent authority. In our view, such a power in any authority would be inappropriate. Domicile is a conclusion of law drawn from the facts of each case irrespective of what the party concerned may directly wish in the matter and whether or not it is to his advantage or disadvantage. Hence, if a person has his home permanently or indefinitely in a country he becomes domiciled there

irrespective of whether he wishes to be, and irrespective of any advantage or disadvantage to him. In our view, giving a court an express power to refuse to recognise a change in domicile in circumstances where a person would otherwise be treated as having received a new domicile would significantly add to the potential for artificiality in the law.

NATURE OF INCAPACITY

6.8 There appears to be no authority on the degree or type of mental incapacity which renders a person of full age incapable in law of acquiring a new domicile. One possibility canvassed is that the capacity may be lost only where such a person has "been compulsorily detained or placed under guardianship"[129] or some similar sort of constraint. Were that the law, it would contemplate persons who in fact lacked the capacity to form the intention necessary to acquire a domicile being treated as though they had that capacity merely because, by chance, they had not been the subject of an application to the authorities or because the degree or type of their mental incapacity did not coincide with that required to impose some official constraint. In this context, it is worth emphasising that it seems likely that the great majority of those within the United Kingdom who do not have the capacity to form the required intention are not under any official constraint. We also think it relevant that in other areas of law such as contract, succession and even crime the general approach of the jurisprudence in the United Kingdom is to treat the capacity to form any intention as a question of fact in each case.

CONCLUSIONS

6.9 We recognise that there is a tension between the claims of certainty and those of appropriateness in any argument about the domicile of an incapax. However, it is rare for an incapax to move home from one country to another, and the number of cases in which more appropriate rules would cause uncertainty would be extremely small. That view and the arguments recited above have led us provisionally to recommend that:

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129 Dicey & Morris, p.140.

(a) the adult who lacks the mental capacity to acquire an independent domicile of choice should be domiciled in the country with which he is for the time being most closely connected; and

(b) the question of capacity should be one of fact in each case.

PART VII

DOMICILE IN FEDERAL OR COMPOSITE STATES

INTRODUCTION

7.1 As we have seen,[130] a person may acquire a domicile of choice by a combination of residence in a country and an intention to make his home in that country permanently or indefinitely. And as explained in Part III, "country" usually means "a territory subject ... to one body of law" or what has become known as a "law district."[131] Hence, a federal state such as the United States of America is not a "country" for the purpose of domicile, and neither are composite states such as the United Kingdom. Rather, such states themselves contain a number of "countries", for example, Iowa or Nebraska in the United States of America, and in the United Kingdom, England and Wales or Scotland or Northern Ireland.

ASSESSMENT OF THE EXISTING LAW

7.2 It follows from what is said above that an immigrant into a federal or composite state does not acquire a domicile until he takes up residence in one of the countries comprising that state with an intention of making his home in that country permanently or indefinitely.

> Take, for example, A, whose domicile from birth has been in Scotland, but who leaves Scotland intending never to return but rather to settle permanently in Canada. He spends some months in Ottawa trying to decide in which Canadian Province to make his home, but before he reaches a decision he dies. At present he would die domiciled in Scotland.

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130 Para. 3.6 above.

131 Dicey & Morris, p.24.

Given that the fundamental purpose of domicile is to connect a person with a system of law in the country with which he is most closely connected, it might be argued that the law, as it currently operates, produces artificiality in cases such as A's by continuing to connect him to a country which he has abandoned.

7.3 It seems clear, however, that wherever the change-over point is fixed, and however it is defined, it must of necessity be arbitrary and will on occasion have anomalous results. Thus, a change in the law which allowed a new domicile to be recognised once a person became resident in a federal state with the intention of living somewhere within its boundaries indefinitely, would result in persons with fairly tenuous links with a country acquiring a domicile there.

> Take, for example, B, who decides to leave England, his domicile of origin, and live indefinitely somewhere in the Mid-West of the United States of America. He lands in New York where he dies shortly after without settling on any particular Mid-Western state. In those circumstances, given that B did not intend to settle in New York State and that he had as yet no home in the common use of the word in the United States of America it would arguably be inappropriate to treat him as domiciled in New York State or, indeed, anywhere in the United States of America. Certainly his family in England might find justifiable ground for complaint if B's intestacy in such circumstances was governed by New York law or indeed by the law of any State of the Union.

7.4 The most extreme cases of artificiality under the existing law occur because in the interregnum between the abandonment of one domicile of choice and the acquisition of another the domicile of origin revives. In those circumstances, it is arguably better to treat the person as domiciled somewhere in a composite state which he has entered (even if he has not settled in or on one of the constituent countries), than to

treat him as domiciled in the country of his domicile of origin in which he may never have been present or which he may have abandoned many years beforehand. However, the substitution of a continuance rule for the doctrine of the revival of the domicile of origin (as we provisionally recommend[132]) would rob that argument of most of its substance.

7.5 In assessing the existing law it must also be borne in mind that, where there is some particular reason for wishing to connect a person who is not domiciled in a country with that country, or the state of which it is a part, legislation may provide for a different connecting factor or create a federal domicile. For example, a domicile in Canada or Australia is sufficient in those countries for divorce proceedings, and habitual residence is sufficient in English law to found an English jurisdiction in such proceedings.[133]

PROPOSALS FOR REFORM

7.6 If, despite what is said above, it were thought desirable to reform the law to enable a person to acquire a domicile in a country in a federal or composite state despite his having no intention to live in any particular country or without his having become resident in the country where he intends to settle, the problem would arise of deciding in which of the constituent countries the immigrant is domiciled. The two solutions which most obviously present themselves are that adopted in Australian legislation and that adopted in New Zealand legislation. Section 11 of the Australian Domicile Act 1982[134] provides that:

> "A person who is, in accordance with the rules of the common law as modified by this Act, domiciled in a union, but is not, apart from this section, domiciled in any particular one of the countries that together form the union, is domiciled in that

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132 Para. 5.22 above.

133 See n. 10 and para 1.12 above.

134 Appendix B.

one of those countries with which he has for the time being the closest connection."

This "closest connection" approach has some advantages. For example, it prevents a person who has arrived in one country in a "union" from becoming domiciled there if his ultimate destination and hence his closest connection is with another country in that "union". It would not, however, necessarily prevent persons, such as B in the example given in paragraph 7.3, above, becoming domiciled in the country of their entry even where they intended to move on to another country but had not yet decided specifically which one.

7.7 The New Zealand approach in section 10 of their Domicile Act 1976[135] looks to residence or physical presence and provides that

"a person who ordinarily resides and intends to live indefinitely in a union but has not formed an intention to live indefinitely in any one country forming part of the union shall be deemed to intend to live indefinitely -

(a) in that country forming part of the union in which he ordinarily resides or

(b) if he does not ordinarily reside in any such country, in whichever such country he is in or

(c) if he neither ordinarily resides nor is in any such country, in whichever such country he was last in."

The major advantage of the New Zealand approach is that it is usually easier to identify where a person is ordinarily resident or merely present than it is to establish a relationship such as "closest connection". The approach has its drawbacks, however, not the least being that a person who becomes ordinarily resident in the union and who is physically present in the country of entry may be treated as domiciled there despite intending to make his permanent home in another country of the union.

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135 Ibid.

Further, as has been pointed out, "where the propositus is for example outside the union for a period of months, his domicile may turn on the identity of the port or airport by which he found it convenient to leave".[136] The result is that the New Zealand law seems to purchase simplicity at the cost of an extreme degree of artificiality in some cases.

CONCLUSIONS

7.8 Whilst allowing a person to acquire a domicile in a federal or composite state before he has formed the required intention in respect of, and become resident in, a particular country would remove artificiality in some cases, it would do so only at the cost of creating it in others. What is more, such a change would complicate both the law and its practice by requiring secondary rules to identify in which of the "countries" within a federal or composite state a person was deemed to be domiciled. The case for such a change would be weakened if the doctrine of revival of the domicile of origin were abandoned as we have previously recommended.[137] For all these reasons we have reached the provisional conclusion that the balance of advantage lies in making no special provision for the acquisition of a domicile in a federal or composite state.

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136 McClean, Recognition of Family Judgments in the Commonwealth (1983) p.27.

137 See para. 4.18 above.

PART VIII

TRANSITIONAL ARRANGEMENTS

INTRODUCTION

8.1 One likely result of amending the law of domicile is that the domicile of some people would be different from what it had been under the unamended law. The question therefore arises whether the amended law should have retrospective effect and, if not, what form the transitional bridge between the pre-amendment and post-amendment law should take.

RETROSPECTIVITY

8.2 We are in no doubt that the introduction of any new rules governing the domicile of persons under United Kingdom law should not operate retrospectively. Were they to do so they might re-open past transactions in areas such as succession, marriage, divorce, legitimacy and taxation. It could, for example, render invalid marriages valid at the time they were contracted under the unamended law. In effect, retrospection could seriously prejudice people who had reasonably and properly conducted their affairs in the light of the prevailing law and their status under it.

TRANSITIONAL PROVISIONS

The Approach of the Domicile and Matrimonial Proceedings Act 1973

8.3 The question of how to provide for a transition from one set of domicile rules to another is not novel in the law of the United Kingdom. Section 1(1) of the Domicile and Matrimonial Proceedings Act 1973, in abolishing the dependent domicile of women, inevitably posed the problem of how to deal with the domicile of women married before the commencement of that Act who until that time had had a domicile dependent on their husband. The solution preferred at that time is found in section 1(2) of that Act which provides that:

> "Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section."

The problem with the approach in section 1(2) is that, rather than determining a person's domicile at a date after commencement by simply applying the new rules to the person's history and circumstances up to that date, it imposes an artificial domicile on a person which can be shaken off only by that person taking appropriate steps after commencement. The undesirable results of that approach are well illustrated by Inland Revenue Commissioners v Duchess of Portland.[138] In that case the respondent was born in Quebec in 1911 to parents resident and domiciled in that Province. In 1948, at the age of 37, she married the Duke of Portland, thereby acquiring an English domicile of dependence. Throughout her marriage she maintained strong links with Quebec, visiting the country annually for two or three months and staying in a house which she owned and maintained, otherwise unoccupied, for that sole purpose. She also retained her Canadian passport and a bank account in Quebec. She persuaded her husband to agree to retire to Quebec when he stopped work and firmly intended to return there if he predeceased her. After the coming into force of the 1973 Act it was held that, despite a never forsaken intention to return to Quebec and her strong links with it, the respondent had not satisfied the criteria necessary to acquire a domicile of choice in Quebec after 1973 nor had her domicile of origin in Quebec revived because she had not since that date abandoned her deemed domicile of choice in England under section 1(2). Accordingly, her domicile of dependence continued, though nominally as one of choice under the Act. It seems almost beyond question that, had the respondent not married her husband or had the

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138 [1982] Ch. 314.

domicile of dependence of married women been abolished before her marriage, the facts of the case would have established that she had retained, uninterrupted, her Quebec domicile of origin. However, given the type of transitional provision in section 1(2), she remained domiciled in England. Given so vivid an illustration of the shortcomings of the approach adopted in section 1(2) of the 1973 Act, we have sought a more satisfactory alternative.

An Alternative Approach

8.4 An example of a provision which avoids both retrospection and the anomalies created by section 1(2) of the 1973 Act, can be found in sections 5(1) and (2) of the Australian Domicile Act 1982. Those subsections provide that:

> "The domicile of a person at a time before the commencement of this Act shall be determined as if this Act had not been enacted."
>
> and
>
> "The domicile of a person at a time after the commencement of this Act shall be determined as if this Act had always been in force."

If the Australian approach had been adopted in the 1973 Act the Duchess of Portland would most probably have been held to have been domiciled in Quebec at all times after the commencement of the Act.

8.5 In our view the approach reflected in the Australian legislation is preferable to that in section 1(2) of the 1973 Act. Though it might be objected that changing the rules governing the domicile of married women again would cause some confusion, on balance, we consider that it would be a beneficial side effect of our proposed general transitional provision that for the future, at least, the undesirable results of section 1(2) would not endure. Accordingly, we see no reason to make any special exemption for such cases and we provisionally recommend that a type of

transitional provision similar to that in the Australian legislation be adopted in any legislation to implement changes in the law of domicile. This provision should replace the provision in section 1(2) of the 1973 Act in relation to the domicile of married women at any time after the amending legislation comes into force.

PART IX

SUMMARY OF PROVISIONAL CONCLUSIONS

INTRODUCTION

9.1 Our provisional conclusions are listed in paragraph 9.3. However, to allow for a clear comparison between the present law (as described in Part III) and the law as it would be were our provisional views implemented, paragraph 9.2 consists of a table setting out in the first column the major rules governing the domicile of natural persons under the laws of the United Kingdom and in the second the proposed corresponding rules.

COMPARATIVE TABLE

9.2

Existing Rules	Proposed Rules
Domicile of Origin	
A person shall receive at birth a domicile of origin determined as follows:	No rule: domicile of origin abolished (paragraph 4.22).
(a) a legitimate child born during the lifetime of his father has his domicile of origin in the country of his father's domicile at the time of his birth.	
(b) a legitimate child born after his father's death, or an illegitimate child, has his domicile of origin in the country of his mother's domicile at the time of his birth;	

(c) an adopted child's domicile of origin is determined as if he were the legitimate child of his adoptive parents; and

(d) a foundling has his domicile of origin in the country in which he is found.

Domicile of Children

The domicile of an unmarried person under 16 (or under 12 or 14 respectively for girls and boys in Scots law) shall, subject to the exception below, be determined as follows:

(a) a legitimate or legitimated child's domicile is the same as, and changes with, the domicile of his father during the father's lifetime and

(b) the domicile of an illegitimate child and of a child whose father is dead is the same as, and changes with, that of his mother.

The domicile of any person under 16 shall be determined as follows:

(a) where he has his home with both his parents his domicile is the same as and changes with that of

(i) his parents if their domiciles are the same and

(ii) his mother if the parents' domiciles are different

(b) where he has his home with one parent only his domicile is the same as and changes with the domicile of that parent; and

(c) in any other case, he is domiciled in the country with which he is for the time being most closely connected (paragraph 4.18).

Exceptions

The domicile of a legitimate child whose parents are living apart, or were living apart when the mother died, is determined as follows:

(a) if he has his home with his mother and has no home with his father, the domicile of the child is the same as, and changes with, that of the mother;

(b) if (a) has applied to him at any time and he has not since had a home with his father, the domicile of the child is the same as, and changes with, that of his mother; and

(c) if at the time of the mother's death, his domicile was dependent on hers by virtue of sub-paragraph (a) or (b) and he has not since had a home with his father, the domicile of the child is that of his mother on her death.

Where the domicile of a child is dependent on his mother's domicile it changes with her domicile only if, acting in the best interests of the child, she so elects.

If a person who has lost his domicile of origin subsequently abandons a domicile without acquiring another his domicile of origin revives.

A domicile continues until a new domicile is acquired (paragraph 5.22).

A person who has reached 16 (or 12 or 14 respectively for girls and boys under Scots law) or married thereunder can acquire a domicile in a country by being resident in that country and having an intention to make his home there permanently or indefinitely.

A person who has reached 16 can acquire a domicile in a country by being resident in that country and having an intention to make his home there indefinitely (paragraph 5.17).

Subject to evidence to the contrary, a person shall be presumed to intend to make his home indefinitely in a country in which he has been habitually resident for a continuous period of seven years or more since reaching the age of 16 (paragraph 5.17).

Domicile of An Incapax

The domicile of an adult incapax is determined as follows:

(a) subject to (b), below, an incapax retains while his incapacity lasts, the domicile he had at the onset of his incapacity or (in Scotland) on the attainment of the age when his domicile of, dependency ceases, whichever is the later, but

(b) in England and Wales and Northern Ireland where the onset of the incapacity pre-dates the person's sixteenth birthday, his domicile of dependency continues thereafter.

An adult incapax shall be domiciled in the country with which he is for the time being most closely connected (paragraph 6.9).

PROVISIONAL CONCLUSIONS

9.3 We provisionally recommend that:

1. Domicile should continue to be used as a connecting factor in the law of England and Wales, Scotland and Northern Ireland (paragraph 2.9).

2. The domicile of a person under the age of 16 should be determined as follows:

(a) where he has his home with both his parents, his domicile should be the same as and change with the domicile of:
  (i) his parents where their domiciles are the same or
  (ii) his mother if the domiciles of his parents are different;

(b) where he has his home with one parent only his domicile should be the same as and change with the domicile of that parent; and

(c) in any other case he should be domiciled in the country with which he is for the time being most closely connected (paragraph 4.18).

3. The domicile of a child at birth should be determined according to the rules in 2. above and accordingly the domicile of origin as a separate type of domicile determined according to a separate set of rules should disappear from the law of the United Kingdom (paragraph 4.22).

4. No person or court should have power to abrogate or override the general rules governing the domicile of a person who is under 16 (paragraph 4.29).

5. The age limit at which an independent domicile of choice can be acquired should, in Scotland, be 16, in line with the rest of the United Kingdom (paragraph 4.30).

6. No special provision is required for determining the domicile of a person who marries under the age of 16 (paragraph 4.32).

7. The domicile of a person under the age of 16 should be determined by the general rules applying to such a person irrespective of the fact that she or he is a parent (paragraph 4.33).

8. The normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile (paragraph 5.17).

9. No higher or different quality of intention should be required when the alleged change of domicile is from one acquired at birth than when it is from any other domicile (paragraph 5.17).

10. To establish a domicile it should be sufficient to show an intention to make a home in a country indefinitely (paragraph 5.17).

11. Subject to evidence to the contrary, a person should be presumed to intend to make his home indefinitely in a country in which he has been habitually resident for a continuous period of seven years or more since reaching the age of 16 (paragraph 5.17).

12. The doctrine of the revival of domicile received by a child at birth should be abolished and replaced by a rule to the effect that an established domicile continues until a new domicile is acquired (paragraph 5.22).

13. A person who has reached the age of 16 but who lacks the mental capacity to acquire a domicile of choice should be domiciled in the country with which he is for the time being most closely connected (paragraph 6.9).

14. Whether a person has the mental capacity to acquire a domicile of choice should be a question of fact in each case (paragraph 6.9).

15. No person or court should have a power to abrogate or override the general rule governing the domicile of an incapax (paragraph 6.7).

16. No special rules need be introduced to govern the domicile of a person who has entered a federal or composite state intending to make his home indefinitely within its boundaries but who has failed to acquire a domicile in any one of the constituent countries under the general rules (paragraph 7.8).

17. Amendments of the law of domicile should not have retrospective effect (paragraph 8.2).

18. The domicile of a person at a time after any amendment of the law of domicile has come into force should be determined as if the amendment had always been in force (paragraph 8.5).

APPENDIX A

Joint Working Party on the Law of Domicile

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Professor A.E. Anton, CBE	Consultant, Scottish Law Commission
Mr. R. Bland	Scottish Courts Administration
Mr. J. Easton	Inland Revenue
Mr. P.G. Harris	Law Commission
Mr. P.M. Harris	Lord Chancellor's Department
Mr. J. Hill	Foreign and Commonwealth Office
Professor J.D. McClean	University of Sheffield
Mr. J.V. Ribbins	General Register Office
Miss J.C. Hern Secretary	Law Commission

(1) DOMICILE ACT 1976
New Zealand

1. Short title and commencement. - (1) This Act may be cited as the Domicile Act 1976.

(2) This Act shall come into force on a date to be appointed by the Governor-General by Order in Council.

2. Interpretation. - In this Act, unless the context otherwise requires - 'Country' means a territory of a type in which, immediately before the commencement of this Act, a person could have been domiciled: 'Union' means a nation comprising 2 or more countries.

3. Domicile before commencement. - The domicile that a person had at a time before the commencement of this Act shall be determined as if this Act had not been passed.

4. Domicile after commencement. - The domicile that a person has at a time after the commencement of this Act shall be determined as if this Act had always been in force.

5. Wife's dependent domicile abolished. - (1) Every married person is capable of having an independent domicile; and the rule of law whereby upon marriage a woman acquires her husband's domicile and is thereafter during the subsistence of the marriage incapable of having any other domicile is hereby abolished.

(2) This section applies to the parties to every marriage, wherever and pursuant to whatever law solemnised, and whatever the domicile of the parties at the time of the marriage.

6. Children. - (1) This section shall have effect in place of all rules of law relating to the domicile of children.

(2) In this section 'child' means a person under the age of 16 years who has not married.

(3) A child whose parents are living together has the domicile for the time being of its father.

(4) If a child whose parents are not living together has its home with its father it has the domicile for the time being of its father; and after it ceases to have its home with him it continues to have that domicile (or, if he is dead, the domicile he had at his death) until it has its home with its mother.

(5) Subject to subsection (4) of this section, a child whose parents are not living together has the domicile for the time being of its mother (or, if she is dead, the domicile she had at her death).

(6) Until a foundling child has its home with one of its parents, both its parents shall, for the purpose of this section, be deemed to be alive and domiciled in the country in which the foundling child was found.

7. Attainment of independent domicile. - Subject to any rule of law relating to the domicile of insane persons, every person becomes capable of having an independent domicile upon attaining the age of 16 years or sooner marrying, and thereafter continues so to be capable.

8. Domicile to continue. - The domicile a person has immediately before becoming capable of having an independent domicile continues until he acquires a new domicile in accordance with section 9 of this Act and then ceases.

9. Acquisition of new domicile. - A person acquires a new domicile in a country at a particular time if, immediately before that time -

(a) He is not domiciled in that country; and

(b) He is capable of having an independent domicile; and

(c) He is in that country; and

(d) He intends to live indefinitely in that country.

10. Deemed intention. - A person who ordinarily resides and intends to live indefinitely in a union but has not formed an intention to live indefinitely in any one country forming part of the union shall be deemed to intend to live indefinitely -

(a) In that country forming part of the union in which he ordinarily resides; or

(b) If he does not ordinarily reside in any such country, in whichever such country he is in; or

(c) If he neither ordinarily resides nor is in any such country, in whichever such country he was last in.

11. Domicile of origin not to revive. - A new domicile acquired in accordance with section 9 of this Act continues until a further new domicile is acquired in accordance with that section: and the rule of law known as the revival of domicile of origin whereby a person's domicile of origin revives upon his abandoning a domicile of choice is hereby abolished.

12. Standard of proof. - The standard of proof which, immediately before the commencement of this Act, was sufficient to show the abandonment of a domicile of choice and in the acquisition of another domicile of choice shall be sufficient to show the acquisition of a new domicile in accordance with section 9 of this Act.

13. Domicile in unions. - A person domiciled in a country forming part of a union is also domiciled in that union.

14. Consequential amendments and repeals. - [not reproduced]

(2) DOMICILE ACT 1982
Australia

1. Short title. - This Act may be cited as the Domicile Act 1982.

2. Commencement. - This Act shall come into operation on a day to be fixed by Proclamation.

3. Object and application - (1) The object of this Act is to abolish the rule of law whereby a married woman has at all times the domicile of her husband, and to make certain other reforms to the law relating to domicile, for the purposes of -

(a) the laws of the Commonwealth; and

(b) the laws of (including the common law in force in) each of the Territories to which this Act applies,

and this Act has effect, and shall be construed, accordingly.

[Sub-sections (2)-(6) - not reproduced.]

4. Interpretation. - (1) In this Act, save where a contrary intention appears -

"adopted" means -

(a) adopted under the law of a State, the Northern Territory or a Territory to which this Act applies relating to the adoption of children; or

(b) adopted under the law of any other country relating to the adoption of chidren, if the validity of the adoption is recognized under the law of a State, the Northern Territory or a Territory to which this Act applies;

"child" means a person who -

(a) has not attained the age of 18 years; and

(b) is not, and has not at any time been, married;

"country" includes any state, province or other territory that is one of 2 or more territories that together form a country;

"union" means any country that is a union or federation or other aggregation of 2 or more countries and includes Australia.

(2) A reference in this Act to the parents of a child shall be read as including a reference to parents who are not married to each other.

5. Operation of Act. - (1) The domicile of a person at a time before the commencement of this Act shall be determined as if this Act had not been enacted.

(2) The domicile of a person at a time after the commencement of this Act shall be determined as if this Act had always been in force.

(3) Nothing in this Act affects the jurisdiction of any court in any proceedings commenced before the commencement of this Act.

6. Abolition of rule of dependent domicile of married woman. - The rule of law whereby a married woman has at all times the domicile of her husband is abolished.

7. Abolition of rule of revival of domicile of origin. - The rule of law whereby the domicile of origin revives upon the abandonment of a domicile of choice without the acquisition of a new domicile of choice is abolished and the domicile a person has at any time continues until he acquires a different domicile.

8. Capacity to have independent domicile. - (1) A person is capable of having an independent domicile if -

(a) he has attained the age of 18 years; or

(b) he is, or has at any time been, married,

and not otherwise.

(2) Sub-section (1) does not apply to a person who, under the rules of the common law relating to domicile, is incapable of acquiring a domicile by reason of mental incapacity.

9. Domicile of certain children. - (1) Where, at any time -

(a) a child has his principal home with one of his parents; and

(b) his parents are living separately and apart or the child does not have another living parent,

the domicile of the child at that time is the domicile that the parent with whom the child has his principal home has as at that time and thereafter the child has the domicile that that parent has from time to time or, if that parent dies, the domicile that that parent has at the time of death.

(2) Where a child is adopted, his domicile -

(a) if, upon his adoption, he has 2 adoptive parents - is, at the time of the adoption and thereafter, the domicile he would have if he were a child born in wedlock to those parents; and

(b) if, upon his adoption, he has one adoptive parent only - is, at the time of the adoption, the domicile of that parent and thereafter is the domicile that that parent has from time to time or, if that parent dies, the domicile that that parent has at the time of death.

(3) A child ceases to have, by virtue of subsection (1), the domicile or last domicile of one of his parents if -

(a) he commences to have his principal home with his other parent; or

(b) his parents resume or commence living together.

(4) Where a child has a domicile by virtue of sub-section (1) or (2) immediately before he ceases to be a child, he retains that domicile until he acquires a domicile of choice.

(5) Where the adoption of a child is rescinded, the domicile of the child shall thereafter be determined in accordance with any provisions with respect to that domicile that are included in the order rescinding the adoption and, so far as no such provision is applicable, as if the adoption had not taken place.

10. Intention for domicile of choice. - The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country.

11. Domicile in union. - A person who is, in accordance with the rules of the common law relating to domicile as modified by this Act, domiciled in a union, but is not, apart from this section, domiciled in any particular one of the countries that together form the union, is domiciled in that one of those countries with which he has for the time being the closest connection.

12. Evidence of acquisition of domicile of choice. - The acquisition of a domicile of choice in place of a domicile of origin may be established by evidence that would be sufficient to establish the domicile of choice if the previous domicile had also been a domicile of choice.

13. Regulations. - [not reproduced].

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